

## Canadian Monopolies Law: Director of Investigation and Research v. NutraSweet Co. Decided as First Case under Abuse-of-Dominance Provision

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# Canadian Monopolies Law: *Director of Investigation and Research v. NutraSweet Co.* Decided as First Case Under Abuse-of-Dominance Provision

## Introduction

When Canada passed the Competition Act<sup>1</sup> in 1986, the Act's novel anti-monopoly provision promised an innovative and distinctly Canadian approach to monopoly control. *Director of Investigation and Research v. NutraSweet Co.*,<sup>2</sup> the first case decided under the new "abuse-of-dominance" provision section 79 of the Act, was a pivotal decision for the fate of the new competition law. The case involved alleged anticompetitive practices by the NutraSweet Company (NSC) after its Canadian aspartame patent expired in 1987. In the absence of Canadian precedent, the Competition Tribunal deciding the case looked to American and European Community (EC) monopolization case law for guidance. In its reliance on the substantive law, however, the Tribunal also adopted the analytical framework used in the United States and the EC and effectively replaced the new section with a mechanism substantially identical to that existing in the United States and the EC.

Section I of this Note will describe the Canadian, American, and European statutes that address abuses of market power. Section II of the Note will compare the rationale of the Canadian Tribunal in *NutraSweet* with the rationale that would have been used in American and European jurisdictions. Section III will illustrate how the Tribunal's reliance on U.S. and EC substantive law led Canada to adopt an analytical framework similar to the one that exists in America and the EC and consequently to transform the Canadian provision.

## I. Background

Section A will describe the Canadian statutory scheme regarding abuses of market position and the correlative anti-monopoly provisions in the United States and in the European Community. Section B will provide the background of the *NutraSweet* case. Section C will explore the predictions of commentators who believed that Canadian courts would use

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1. R.S.C., ch. C-34 (1985) (Can.), as amended.

2. No. CT-89/2 (Comp. Trib. Oct. 4, 1990).

U.S. and EC substantive law to decide the case. Finally, Section D will conclude that these predictions were fulfilled.

A. Competition Law in Canada, the United States and the European Community

1. *Canada's Competition Act*

On June 19, 1986, after twenty years of attempted antitrust law reform, the Canadian government enacted the Competition Act. The Act culminated a two-stage revision of the older Combines Investigation Act,<sup>3</sup> the first stage of which was implemented in 1976. In addition to changing the name of the previous legislation, the new Competition Act (1) replaced the criminal prohibition of monopolies with a civil proceeding, addressing anticompetitive practices of firms "abusing" their "dominant position," and (2) replaced the Restrictive Trade Practice Commission with a newly created Competition Tribunal, which has jurisdiction over anticompetitive practices involving abuse of dominance.<sup>4</sup>

Commentators had long considered Canadian monopoly law to be ineffective and obsolete.<sup>5</sup> Although the criminal prohibition against monopolies had existed since 1910, it had produced merely fifteen prosecutions<sup>6</sup> and one conviction.<sup>7</sup>

Several problems with the old Act, particularly its criminal nature, were evident. First, the criminal burden of proof, "beyond a reasonable doubt," was too onerous for the Crown, given the nature of the conduct prohibited by the provision.<sup>8</sup> Second, "the behavior being censured did not have the moral taint necessary to be considered criminal, so judges would not convict."<sup>9</sup> Third, "[j]udges, not being economists and having very little familiarity with the issues, did not have the tools to creatively deal with the law."<sup>10</sup> Fourth, "[t]he law was not sufficiently certain to guide the behavior of businessmen and the decisions of the judges."<sup>11</sup>

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3. Ch. 9, 1910 S.C. 131 (Can.).

4. GORDON KAISER, COMPETITION LAW OF CANADA § 1.01[7], at 21-23 (1989).

5. *Id.* § 14.02, at 5.

6. W. T. Stanbury, *The New Competition Act and Competition Tribunal Act: "Not With a Bang, But a Whimper,"* 12 CAN. BUS. L. J. 2, 29 (1986-87).

7. *Eddy Match Co. v. Queen* (1954) 18 C.R. 357; 109 C.C.C. 1; 20 C.P.R. 107 (Que. C.A.). The conviction was of little instructive value, as it involved an obvious abuse of monopoly power. KAISER, *supra* note 4, § 9.01, at 3.

8. The civil law standard of proof is "on a balance of probabilities." Lawson A. W. Hunter & John F. Blakney, *The Changing Canadian Competition Law Environment: Implications for International Business*, 1 REV. INT'L BUS. L. 235, 238 (1987).

9. Roger L. Martin & Brad Martin, *Abuse of Dominance or Abuse of Reason?*, 8 CAN. COMPETITION POL'Y. REC. 61, 61 (1987) (noting that the OLA Act, the legislative prohibition on monopolies with "detrimental characteristics" was so vague that the courts gave it a highly restrictive interpretation, accepting "only the most obvious and severe abuses of power" and "only when proved beyond a reasonable doubt."). See also J. BRUCE DUNLOP ET AL., CANADIAN COMPETITION POLICY: A LEGAL AND ECONOMIC ANALYSIS 191 (1987).

10. Martin & Martin, *supra* note 9, at 61.

11. *Id.*

Fifth, the methods used to acquire and retain a market concentration, not the existence of the concentration itself, should have been the focus of the inquiry, as concentrations may in fact be beneficial.<sup>12</sup> Sixth, the statute did not exempt conduct that appeared to lessen competition but really effected superior competitive performance.<sup>13</sup>

Section 79 of the Competition Act prohibits "abuse of a dominant position,"<sup>14</sup> forbidding the practice of "anticompetitive acts" by those in "substantial" or "complete" control of a "class of species of business" if such acts lessen competition "substantially." Claims under sec-

12. KAISER, *supra* note 4, § 9.01, at 3. See also R. D. Anderson & S. D. Khosla, *Reflections on McDonald on Abuse of Dominant Position*, 8 CAN. COMPETITION POL'Y. REC. 51, 56-57 (1987) (noting that the acts listed in section 78 are not illegal unless they cause competition to be lessened substantially as required by section 79(1)(c), a requirement "consistent with modern antitrust thought which emphasizes that [such] practices . . . may be anti-competitive, pro-competitive or even competitively neutral depending on the circumstances.").

13. KAISER, *supra* note 4, § 9.01, at 3. See also DUNLOP ET AL., *supra* note 9, at 191.

14. 79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Competition Act § 79, as amended. Nine specific "anti-competitive acts," mentioned in section 79(1)(b), are enumerated in section 78:

78. For the purposes of section 79, "anti-competitive act," without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

*Id.* § 78.

tion 79 arise under the jurisdiction of the Competition Tribunal, newly established by the Act, which is also seized of non-criminal matters of competition.<sup>15</sup> Members of the Tribunal are culled from both lay and judicial ranks in an attempt to provide both economic and legal expertise.<sup>16</sup> The Tribunal adjudicates only, unlike the Federal Trade Commission in the U.S., which also promulgates regulations. The Director of Investigation and Research undertakes investigative functions.<sup>17</sup> Only the Director may make applications to the Tribunal regarding potential violations of section 79.<sup>18</sup> Third parties must ask the Director to make an application on their behalf. Parties having legitimate interests in matters being heard can intervene once the Director has submitted an application.<sup>19</sup>

## 2. *The United States and the European Community*

### a. The United States

The Sherman Act is a criminal statute providing that "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor."<sup>20</sup> It is, however, "well settled" that section 2 does not prohibit monopoly *simpliciter*—or, as the Supreme Court phrased it in the early landmark case of *Standard Oil* 'monopoly in the concrete.'"<sup>21</sup>

The offense of "monopolization" has two elements: (1) "possession of monopoly power in the relevant market," and (2) "acquisition or maintenance of that power" by means other than "superior product, business acumen, or historic accident."<sup>22</sup> Unlawfully acquired monopoly power always violates section 2, even when "the power has not been

15. KAISER, *supra* note 4, § 3.06[5], at 72.

16. *Id.* at 71. The legislation provides that the Tribunal will consist of up to four judges of the Federal Court Trial Division and up to eight lay specialists. Appointments are for up to seven-year terms, and both lay and judicial members may be re-appointed. Panels of three to five members hear applications, and they must include at least one lay and one judicial member. Judicial members alone must decide all questions of pure law. *Id.* at 71-72.

17. *Id.* at 71. To some extent, the Tribunal is modelled after the Swedish Market Court and the U.K. Restrictive Practices Court. *Id.*

18. *Id.* at 72.

19. *Id.* at 72-73.

20. Sherman Act § 2, 15 U.S.C. § 2 (1988). The Sherman Act is unlike its Canadian and European Community counterparts in that it contains no illustrations of violative conduct. "In passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. Section 2, therefore, in effect conferred upon the federal courts 'a new jurisdiction to apply a 'common law' against monopolizing.'" *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (quoting 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 40 (1978)).

21. *Berkey Photo*, 603 F.2d at 273 (citation omitted) (quoting *Standard Oil Co. of N.J. v. United States*, 222 U.S. 1, 62 (1911)).

22. *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71 (1966).

used to extract improper benefits.”<sup>23</sup> Legitimately acquired monopoly power only violates the statute when used to “maintain” or to “extend” market control.<sup>24</sup>

## b. The European Community

The European equivalent of section 2 of the Sherman Act is Article 86 of the Treaty of Rome, which reads in part: “Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States.”<sup>25</sup>

An Article 86 violation requires: (1) that the undertaking involved possesses a dominant market position; (2) that the undertaking has abused that position; and (3) that the abuse affects trade between Member States.<sup>26</sup> In *Hoffmann-La Roche*, the Court of Justice of the European Communities gave this Article its fullest explication. The Court explained that the purpose of Article 86 is to ensure that the Community may achieve its “general objective,” that competition in the Common Market not be distorted.<sup>27</sup> A “dominant position” is a “position of eco-

23. *Berkey Photo*, 603 F.2d at 274.

24. *Id.* In *Berkey Photo*, Judge Kaufman attempted to wade through some of the contradictions in American monopoly law. He noted, for reasons of fairness and the maintenance of economic incentives, that section 2 does not reach those who have gained monopoly power by purely competitive means, but only those who “exercise” their monopoly power. *Id.* At the same time, “exercising” one’s monopoly power by setting a high price is not anticompetitive because “there is no better way for [a firm] to guarantee that its dominance will be challenged than by greedily extracting the highest price it can.” *Id.* at 294.

25. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1957, 298 U.N.T.S. 11, art. 86. The Article continues:

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Id.* The Court of Justice has confirmed that the list of abuses contained in Article 86 (a) to (d) is not an exhaustive enumeration of possible abuses. *See, e.g.*, Case 6/72, *Europemballage v. Commission*, 1973 E.C.R. 215, 245, 1973 C.M.L.R. 199, 224.

26. EEC TREATY, *supra* note 25, art. 86. Yet “if the occupier of a dominant position, established in the Common Market, aims at eliminating a competitor who is also established in the Common Market, it is immaterial whether this behavior relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.” Case 27/76, *United Brands Co. v. Commission*, 1978 E.C.R. 207, [1978] 1 C.M.L.R. 429, 497.

27. Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 520, [1979] 3 C.M.L.R. 211, 274-75.

Article 86 is an application of the general objective of the activities of the Community laid down by Article 3(f) of the Treaty, namely, the institution of a system ensuring that competition in the Common Market is not dis-

conomic strength" that enables a firm "to behave independently of competitors, customers and consumers."<sup>28</sup> A firm in a dominant position may take reasonable steps necessary to protect its commercial interests but cannot strengthen or abuse its dominant position.<sup>29</sup>

B. The Beginnings of the New Canadian Case Law: *Director of Investigation and Research v. NutraSweet Co.*

On June 1, 1989, Canada's Director of Investigation and Research filed notice pursuant to the Competition Act, under section 79, prohibiting abuse of a dominant position, and under section 77, prohibiting exclusive dealing and tied selling. The Director requested that the Tribunal stop anticompetitive practices of NutraSweet Company and issue orders necessary to overcome the adverse market effects caused by those practices.<sup>30</sup> The Director's application to the Tribunal was the first civil case on "abuse of a dominant position" in Canadian history because it was the first application made under the new competition law provision of section 79.<sup>31</sup>

NSC produces aspartame, an artificial sweetener used primarily in diet soft drinks, chewing gum, low-calorie foods and table-top sweeteners.<sup>32</sup> NSC sells approximately ninety-five percent of the aspartame in Canada; Canadian sales represent about five percent of aspartame sales worldwide.<sup>33</sup> As a comparison, in 1989, seventy-five percent of the aspartame sold in the world was sold in the U.S., where NSC, because of its use patent, had a one hundred percent share; fifteen percent was sold in Europe where NSC had an eighty percent share.<sup>34</sup> Although NSC's Canadian use patent expired in July 1987, the life of its U.S. patent has been extended until December 1992.<sup>35</sup>

The Tribunal examined the Director's principal allegations under

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torted. . . . The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

*Id.*

28. *Id.*

29. *United Brands*, 1978 E.C.R. at 293, [1978] 1 C.M.L.R. at 496. *See also* Case T-51/89, *Tetra Pak Rausing SA v. Commission*, [1991] 4 C.M.L.R. 334, 361 (A.G. Opinion).

30. *NutraSweet*, No. CT-89/2 at 5.

31. Written Argument of the Applicant, Director of Investigation and Research, Public Version at 2, *Director of Investigation and Research v. NutraSweet Co.*, No. CT-89/2 (Comp. Trib. Oct. 4, 1990) [hereinafter Written Argument of the Applicant].

32. *Id.* at 6. NSC Canada is a branch of NSC, a U.S. company that is a wholly-owned subsidiary of Monsanto Co. *Id.*

33. *Id.* at 7.

34. *Id.*

35. *Id.* at 6-7. The Director's investigation was initiated by a complaint made by Tosoh Canada ("Tosoh"), a corporation responsible for marketing efforts to sell in Canada aspartame manufactured by NSC's only rival in Europe and Canada, the Holland Sweetener Company (HSC), a joint venture between Naamloze Vennootschap

"two broad heads."<sup>36</sup> First, the Tribunal reviewed contract terms alleged to create an exclusive-supply relationship between NSC and its customers. The Director argued that the terms restricted the entry of would-be or existing competitors. The Tribunal analyzed the issue both under section 77, "which specifically addresses exclusive dealing and tied selling,"<sup>37</sup> and under section 79, which more generally addresses "anti-competitive acts" undertaken by a firm in a dominant position.<sup>38</sup> Second, the Tribunal examined the allegation that NSC was selling below "acquisition cost," an anticompetitive act specifically mentioned in section 78(i), but with distinct elements.<sup>39</sup>

The Director used European and American case law to support his case against NutraSweet, and sought to convince the Tribunal to do the same. At the outset of his argument on the merits, the Director pointed to the dearth of Canadian precedent and stated:

[T]he European Community . . . and the United States . . . have both enacted legislation which limits the acceptable behavior of a dominant firm in a defined market. Although the wording of Article 86 of the Treaty of Rome and section 2 of the Sherman Act differ substantially from section 79 of the Act, they deal with similar problems in a similar commercial context and in light of similar legal concepts. Consequently, . . . that cases decided by courts in the United States and the European Community are helpful and should be persuasive to the Tribunal.<sup>40</sup>

Prior to *NutraSweet*, many commentators maintained that European and American case law would be persuasive before the Tribunal because the monopoly provisions in the new act seemed to have their genesis in the laws of the United States and the EC.<sup>41</sup> For instance, the "abuse of a

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DSM and Tosoh Corporation of Japan. *Id.* at 9-10. Tosoh started marketing operations in Canada as soon as NSC's Canadian use patent expired in 1987. *Id.* at 9.

36. *NutraSweet*, No. CT-89/2 at 10.

37. *Id.* at 11.

38. The Director contended that exclusive-supply devices, though not listed in the "non-exhaustive" list of anticompetitive acts in § 78, fell within the "general criteria" for such acts in that section." *Id.*

39. *Id.* "It virtually constitutes a separate case with regard to the elements that must be satisfied." See Competition Act, § 78(i).

40. Written Argument of the Applicant, *supra* note 31, at 2.

41. Warren Grover & Robert Kwinter, *The New Competition Act*, 66 CAN. B. REV. 267, 268 (1987); Hunter & Blakney, *supra* note 8, at 238. "It should also be noted that although American jurisprudence will no doubt be scrutinized very carefully by the Director and by the Competition Tribunal in thinking through the issues arising from the application of sections [78] and [79], the sections are narrower in scope than section 2 of the *Sherman Act*. Section 2 of the *Sherman Act* deals with "monopolization," which is roughly comparable to Canada's abuse provisions, but it also deals with attempts to monopolize and with combinations or conspiracy to monopolize. Attempts to monopolize involve attempts to obtain monopoly power, which is to say sufficient power to control prices or to exclude competition. Under the new Canadian provisions this type of significant market power is a precondition to the application of section [79]." Bruce C. McDonald, *Abuse of Dominant Position*, 8 CAN. COMPETITION POL'Y. REC. 59, 60 (1987).

The Director's use of American and European law fulfilled the prophecy of Warren Grover:



dominant position" provision echoes the wording of Article 86 of the Treaty of Rome; the anticompetitive acts listed in section 78 seem to have been culled from American and Canadian case law.<sup>42</sup> Section 79 filled a vacuum in Canadian monopoly law. Consequently, it is not surprising that the Director persuaded the Tribunal in *NutraSweet* to rely on U.S. and EC case law in interpreting section 79, thus filling a vacuum in Canadian monopoly jurisprudence.<sup>43</sup>

By utilizing U.S. and EC law to such a great extent, however, the Tribunal altered both the essential shape of Canada's "abuse of dominance" provision and the future course of case law decided under that provision. The Tribunal deemphasized the plain language of the unique Canadian provision, and thereby created a provision with workings and results mirroring the Sherman Act and Article 86. The Tribunal not only used the substantive holdings of American and European case law, but also adopted their analytical framework *in toto*, implicitly altering the provision to conform to American and European models. Section 79, its original framework having been discarded, now stands as a clone of its EC and U.S. predecessors.

## II. Analysis of the Substantive Law

Section II of this Note will examine the Tribunal's substantive analysis of the "abuse of dominance" provisions that NSC allegedly violated and the analytical framework it employed in its decision. This Section will investigate the Tribunal's motives, authority, and reasoning in (1) defining the product market, (2) defining the geographic market, (3) determining whether NSC possessed "control" over the markets, (4)

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The history of Canadian antitrust has been to borrow most ideas from the United States, and I am sure we will find much reference to U.S. source documents in submissions made to the Bureau of Competition Policy, although probably without attribution. It is interesting to note how far advanced the European Community is in this regard, as Canada likes to think that it has a European perspective as well as a North American one.

Warren Grover, *Canadian Antitrust Aspects of Competing in Foreign Markets*, 14 CAN.-U.S. L. J. 93, 104 (1988).

42. Grover & Kwinter, *supra* note 41, at 287-88. However, while provisions of U.S. and Canadian antitrust law show a "tremendous convergence," David G. Gill, *U.S. and Canadian Antitrust Aspects of Competing in Foreign Markets*, 14 CAN.-U.S. L. J. 105, 106 (1988), this convergence may not be facilitated by the Canada-U.S. Free Trade Agreement (FTA), Free Trade Agreement, Dec. 22, 1987 and Jan. 2, 1988, Canada-United States, H.R. Doc. No. 216, 100th Cong., 2d Sess. 297 (1988), *reprinted in* 27 I.L.M. 281 (1988). Harmonization of the competition laws of the two countries, however, is not even on the drawing board. *New Personnel and New Programs Will Mark Competition Enforcement Throughout World*, 59 ANTITRUST & TRADE REG. REP. 80, 83 (1990). See also Joseph P. Griffen & Michael R. Calabrese, *U.S. Antitrust Aspects of Competing in Foreign Markets and the Canada-U.S. Trade Agreement*, 14 CAN. U.S. L. J. 85, 91 (1988) (explaining that on account of the absence of agreement about international discovery and about Canadian regulation of U.S. firms' acquisition of Canadian companies, the FTA is unlikely to affect U.S. antitrust policy significantly).

43. The Director's success probably even exceeded the expectations of Warren Grover. Not surprisingly, Grover served as counsel for the Director in *NutraSweet*. See *NutraSweet*, No. CT-89/2 at 2.

determining whether NSC abused its dominant position through "anticompetitive acts," and (5) determining whether such abuse lessened competition substantially in the "market." By examining American and EC case law, this Section will show that the Tribunal adhered strictly to American and Community precedent on substantive law and adopted the analytical framework used in monopolization cases in both the U.S. and the EC.

#### A. The Product Market

The "product market" consists of that product or those products for which a firm's market position is to be calculated. Along with the "geographic market," the product market helps to define the "market" in which a firm's "control" (or "dominant position" or "monopoly power") is to be evaluated. Subsection 1 of this Section will discuss the product market issue before the Tribunal—whether sweeteners other than aspartame should be included in the product market. Subsection 2 of this Section will set forth the U.S. and the EC approaches to determining the relevant product market. Subsection 3 will conclude that the Tribunal's decision was identical to the decision that would have been reached in America or Europe.

##### 1. *NutraSweet's Product Market*

NSC argued that sweeteners other than aspartame should be included in the product market. Under this view, NSC's position in the market would have been small, thereby negating any possibility of market control. Conversely, the Director argued NSC had a ninety-five percent share of Canadian<sup>44</sup> sales of aspartame. The definition of product market is a necessary step in finding "control" of a market. The Tribunal concluded that substitutability between aspartame and other sweeteners was limited and that, therefore, aspartame was the relevant product market. As an initial matter, the Tribunal believed that the language of subsections (1)(a) and (1)(c) of section 79 demanded inquiry into the product market. These provisions respectively refer to substantial or complete control of "a class or species of business" and substantial lessening of competition in a "market."<sup>45</sup> The determination to be made was primarily one of "substitutability"—"whether, and in what ways, other sweeteners are good substitutes for aspartame" and, thus, whether aspartame constituted a separate market or was "part of a broader class of sweeteners."<sup>46</sup>

The Tribunal determined that aspartame differed from other sweeteners and constituted a distinct product market. This conclusion was

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44. Assuming, of course, that the geographic market was to be limited to Canada.

45. *NutraSweet*, No. CT-89/2 at 11-12.

46. *Id.* at 12. The Tribunal stated that many factors could be of relevance in a substitutability determination. In the instant action, the Tribunal relied upon "taste, caloric content, other physical characteristics, safety concerns, price differences, and users' responses to price changes." *Id.*

supported by several factors.<sup>47</sup> First, “distinct physical and functional characteristics” of the relevant sweeteners limited substitutability.<sup>48</sup> Aspartame’s heat and storage instability tends to limit it to “wet” uses, i.e., where it is dissolved when it reaches the consumer.<sup>49</sup> Saccharin has a bitter aftertaste and, along with cyclamates, is considered by some to pose health risks.<sup>50</sup>

Second, the Tribunal found the substitutability to be limited by regulations that restrict the use of high-intensity sweeteners, which, in developed countries, must undergo lengthy and rigorous approval procedures.<sup>51</sup> For instance, cyclamates are currently banned in the U.S., and regulatory approvals entail such a delay that newer artificial sweeteners such as acesulfame-k, sucralose, and alitame will not soon compete with aspartame in the diet soft drink market.<sup>52</sup> There was some evidence, however, that, through blending, high-intensity sweeteners could compete with aspartame.<sup>53</sup>

Third, the Tribunal found that limited substitutability existed between caloric sweeteners, such as sugar and high-fructose corn syrup, and high-intensity sweeteners, such as aspartame. Evidence illustrated that diet products required intense sweeteners in order to be low in calories.<sup>54</sup> Similarly, there was no direct<sup>55</sup> competition between caloric sweeteners and aspartame because aspartame was not used to replace sugar in caloric drinks even when less expensive on a sweetness-equivalency basis.<sup>56</sup> Additionally, the Tribunal found only weak evidence of indirect competition, because the prices and marketing schemes of diet and full-calorie products remained constant despite changes in the price of aspartame relative to sugar.<sup>57</sup> The Tribunal concluded that demand for diet products was dictated primarily by lifestyle, and that price differences in aspartame and sugar had almost no substitutive effects.<sup>58</sup>

The Tribunal found most illuminating a comparison of the price of aspartame in the American and Canadian markets. In the U.S., because of NSC’s use patent, price is limited only by the competition of other sweeteners; in Canada, where NSC’s use patent expired in 1987, “there

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47. In its analysis, the Tribunal apparently found the arguments of the Director persuasive. See Written Argument of the Applicant, *supra* note 31, at 108.

48. *Id.*

49. *NutraSweet*, No. CT-89/2 at 18-19.

50. *Id.* at 19-20.

51. *Id.* at 16.

52. *Id.* at 20-21.

53. *Id.* at 21.

54. Written Argument of the Applicant, *supra* note 31, at 109.

55. Direct competition exists when one sweetener is selected over another for a particular use, while indirect competition is competition between products containing different sweeteners. *NutraSweet*, No. CT-89/2 at 22.

56. *Id.*

57. *Id.* at 23-24.

58. *Id.* at 27.

is at least the possibility of competing aspartame suppliers.”<sup>59</sup> The price in the U.S. exceeds the Canadian price by more than fifty percent, making it clear that the price of aspartame is not constrained by competition from other sweeteners already on the market.<sup>60</sup>

Thus, the Tribunal concluded that aspartame’s only competition from other sweeteners came from “very weak” evidence of indirect competition with caloric sweeteners, and “some” direct competition with other high-intensity sweeteners.<sup>61</sup> It therefore tentatively labelled the relevant product market as “aspartame,” noting, however, that “[i]t really matters little . . . whether the relevant product is defined as ‘aspartame’ or ‘high-intensity sweeteners’ so long as the limited extent to which other high-intensity sweeteners constrain aspartame prices is kept in mind.”<sup>62</sup>

## 2. *The United States and the European Community*

### a. *The United States*

In the U.S. “[i]t is, of course, a basic principle in the law of monopolization that the first step in a court’s analysis must be a definition of the relevant markets.”<sup>63</sup> The principles for determining product market—the “reasonable interchangeability” test—were spelled out in the seminal *Cellophane* case.<sup>64</sup> Interchangeability is determined by the “cross elasticity of demand” between products, a measure of consumer willingness to switch from purchasing one product to another when a change in relative prices between the products occurs; a low cross-elasticity of demand between two products indicates that they occupy different markets.<sup>65</sup> A low value for cross-elasticity probably represents consumer belief that the products are separate.<sup>66</sup> *Brown Shoe Co. v. United States*<sup>67</sup> modified this test and increased the reach of the Sherman Act by using “submarkets” to define the product market.<sup>68</sup> Well-defined submarkets

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59. *Id.* at 29.

60. *Id.*

61. *Id.* at 30.

62. *Id.* The Tribunal also noted that, since aspartame was the only high-intensity sweetener allowed as a food additive in Canada, the effect of foreign competition on Canadian aspartame prices was indirect. Consequently, the critical question was the degree of insulation in the Canadian market from the effects of competition elsewhere, and this question was to be answered by examining the geographic market. *Id.* at 30-31.

63. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

64. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (holding that though the defendant controlled the “cellophane” market, the interchangeability of cellophane with other flexible wrapping materials sufficed to make it part of the “flexible packaging material” market, in which defendant faced competition—hence, there was no illegal monopoly).

65. *See id.* at 394-404.

66. *Id.*

67. 370 U.S. 294 (1962).

68. Logically, if the product market is narrowed, the remaining firms’ market share and market power will increase. For example, a producer of 80% of the apples

may exist for antitrust purposes within the broad boundaries of *Cellophane's* product market. The boundaries are determined "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."<sup>69</sup>

In *Borden*, which exemplifies the *Cellophane* analysis,<sup>70</sup> the court had to evaluate the F.T.C.'s decision not to include fresh lemons in the product market of a processed lemon juice manufacturer. If the court concluded that fresh lemons should be included in the product market, it probably would not have found monopoly power because such a finding would have dramatically reduced market share.<sup>71</sup> The court agreed with the F.T.C.'s determination that the two products were not reasonably interchangeable, in view of low cross-elasticity and a host of other factors.<sup>72</sup> The court found that the *Cellophane* analysis mandated these considerations:

The *Cellophane* test . . . is not merely whether one product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced when prices, uses, and qualities of the products are considered. . . . If the quality differences between two products are such that consumers would not consider one product a viable substitute for another in making their purchasing decisions, regardless of whether one product actually can be substituted for the use of another, then these quality differences must be considered in determining the reasonable interchangeability of the products in a competitive market.<sup>73</sup>

In *Borden*, factors such as convenience, storage capabilities, taste, the presence of chemical additives, and decorative uses illustrated the differences between fresh lemons and processed lemon juice. The differences buttressed the FTC's conclusion that "considering price, use and quality, fresh lemons were not reasonably interchangeable with processed lemon juice."<sup>74</sup>

#### b. The European Community

The European Commission also relies heavily on the concepts of substitutability and price elasticity to define product markets:

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in the U.S. will not have a monopoly in the "fruit" market if apples constitute 20% of the fruit sold. But if the market, or the submarket, is defined as "apples," there is a strong case for the presence of monopoly power.

69. *Brown Shoe*, 370 U.S. at 325 (footnote omitted). For an analysis of the presence of a submarket, see *Cass Student Adv., Inc. v. National Educational Adv. Serv., Inc.*, 516 F.2d 1092 (7th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975).

70. *Borden, Inc. v. F.T.C.*, 674 F.2d 498 (6th Cir. 1982).

71. *Id.* at 507. *Borden's* market share would have dropped from 95% to below 10 percent. *Id.*

72. *Id.* at 507-09.

73. *Id.* at 508.

74. *Id.* at 509.

In the context of Article 86, the object of market delineation is to define the area of commerce in which conditions of competition and the market power of the dominant firm is to be assessed. The concept of substitutability involves the question whether the market is drawn broadly enough so as to include not only the products manufactured or marketed by the allegedly dominant producer but also those which are in effective competition with it.<sup>75</sup>

The leading market-definition case before the Court of Justice of the European Communities, *United Brands*, concluded that "particular features" of bananas limit their interchangeability and thus insulate them from the rigors of competition with other fruits.<sup>76</sup> Characteristics including "appearance, taste, softness, seedlessness, easy handling, [and] a constant level of production" enabled bananas to "satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick."<sup>77</sup> Small price variations in response to seasonal competition confirmed that "a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from" bananas by price fluctuations and thus "the banana market is a market which is sufficiently distinct from the other fresh fruit market."<sup>78</sup>

The EC also uses submarkets to define the relevant product market if "sufficiently distinct in commercial reality to allow a supplier which dominates it the power to exclude competition or control prices."<sup>79</sup> Narrow market definition will not preclude the application of Article 86.<sup>80</sup>

To find dominant market position it is not necessary to conclude that there is a "complete absence of competition from other partially

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75. Commission Decision 85/609 of 14 December 1985 Relating to a Proceeding under Article 86 of the EEC Treaty (ECS/AKZO), 1985 O.J. (L 374) 1, 17, [1986] 3 C.M.L.R. 273, 302.

76. Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207, 270, [1978] 1 C.M.L.R. 429, 481.

77. *Id.*, 1978 E.C.R. at 273, [1978] 1 C.M.L.R. at 483.

78. *Id.*, 1978 E.C.R. at 273, [1978] 1 C.M.L.R. at 483-84. See also Commission Decision 88/501 of 26 July 1988 Relating to a Proceeding under Articles 85 and 86 of the EEC Treaty (Tetra Pak I (BTG License)), 1988 O.J. (L 272) 27, [1990] 4 C.M.L.R. 47; Commission Decision 88/518 of 18 July 1988 Relating to a Proceeding under Article 86 of the EEC Treaty (*Napier Brown v. British Sugar*), 1988 O.J. (L 284) 41, [1990] 4 C.M.L.R. 196. Interestingly, *Napier Brown* addressed the interchangeability of caloric and high-intensity sweeteners and came to the same conclusion as the *NutraSweet* Tribunal: "[i]ndustrially produced sugar substitutes such as saccharin, cyclamates or aspartame only compete with natural sugar in limited uses such as 'diet' products, and thus do not form part of the same relevant product market as granulated sugar." *Napier Brown*, 1988 O.J. (L 284) at 50, [1990] 4 C.M.L.R. at 215.

79. Commission Decision 87/500 of 29 July 1987 Relating to a Proceeding under Article 86 of the EEC Treaty (*Brass Band Instruments, Ltd. v. Boosey & Hawkes*), 1987 O.J. (L 286) 36, [1988] 4 C.M.L.R. 67.

80. *Id.*

interchangeable products.”<sup>81</sup> Thus, in *Michelin*, the retreading industry did not weaken a dominant position in the new replacement tire industry because Michelin was still able to “influence . . . the conditions in which . . . competition may be exerted” and “to conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude.”<sup>82</sup>

### 3. *Conclusions as to the Product Market*

The Tribunal paralleled generations of U.S. and EC antitrust cases by beginning its analysis with the question of market definition, and by initiating that inquiry with an investigation of the product market. Initially, and perhaps inevitably, the Tribunal defined product market in terms of substitutability, as do the U.S. and the EC. The Tribunal’s reliance on distinct physical characteristics as evidence of non-substitutability resembles the analysis of the U.S. court in *Borden* and the EC court in *United Brands* because the pivotal inquiry was whether “consumers would . . . consider one product a viable substitute for another . . . regardless of whether one product actually can be substituted for the use of another. . . .”<sup>83</sup> The Tribunal also imitated the EC rationale when it found that customer demand for aspartame (like customer demand for bananas in *United Brands*) was related primarily to lifestyle. By disregarding some limited competition from other products, the Tribunal again mimicked the Court of the European Communities.

Consequently, by narrowing the product market from sweeteners to aspartame alone, the Tribunal imitated recent American and European case law. This case law has actively winnowed markets and submarkets, consequently increasing the number of markets and submarkets and, accordingly, the number of determinations that market power exists.

### B. The Geographic Market

“Geographic market” defines the area in which a firm’s “control” of a “product market” is to be ascertained. Subsection 1 of this Section will set forth the analysis of the issue before the Tribunal, whether the geographic market was worldwide, as contended by NSC, or limited to Canada, as posited by the Director. Subsection 2 of this Section will present U.S. and EC law defining the geographic market. Subsection 3 concludes that the Tribunal’s decision mirrors the U.S. and EC approaches.

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81. Case 322/81, *Nederlandsche Banden-Industrie Michelin N.V. v. Commission*, 1983 E.C.R. 3461, 3508, [1985] 1 C.M.L.R. 282, 325.

82. *Id.* See also Commission Decision 85/609 of 14 December 1985 Relating to a proceeding under Article 86 of the EEC Treaty (ECS/AKZO), 1985 O.J. (L 374) 1, 17, [1986] 3 C.M.L.R. 273, 302-03 (holding that even if other products that could be substituted for organic peroxides in one of their minor uses were included in the product market, the dominant position of AKZO was not weakened because “in the more important usages organic peroxides are not subject to competition from other chemicals”).

83. *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 508 (6th Cir. 1982).

*1. NutraSweet*

If the Tribunal determined that the geographic market consisted solely of Canada, NSC's ninety-five percent share of the country's aspartame sales would render a finding of market control likely. Conversely, because NSC's worldwide share of aspartame sales was lower than its Canadian share, defining the geographic market as worldwide would limit the likelihood of establishment of market control. The Tribunal concluded, however, that Canada was the appropriate geographic market in which to analyze NSC's market control.

The Tribunal defined geographic market as "an area . . . sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas."<sup>84</sup> Consequently, the Tribunal accepted the Director's arguments that Canada was an appropriate geographic market for aspartame because (1) the price of aspartame around the world differed significantly from the price in Canada, and (2) Canada was treated separately with respect to volume and price in multi-nation contracts between NSC and Coca-Cola and Pepsi.

Addressing the first argument, the Tribunal agreed that the price was a critical factor in determining whether the Canadian market should be segregated from the rest of the world.<sup>85</sup> The price of aspartame differed significantly. Canadian prices were ten percent lower than prices in Europe in 1987, six percent lower in 1988, and thirteen percent higher in 1989.<sup>86</sup>

The Director's second argument was pivotal in negating NSC's contention that the geographic market was worldwide. NSC maintained that outside suppliers could quickly enter Canada, if NSC attempted to raise prices, because transportation costs were low, the infrastructure required for distribution was minimal, and no Canadian tariff or non-tariff barriers existed.<sup>87</sup> The Tribunal rejected this contention and relied on the Director's argument that "supply contracts for aspartame are country or region specific."<sup>88</sup> The Tribunal added that "[t]o the extent equalization occurs, it is more likely to come from the negotiating position of multinationals who account for a large fraction of purchases."<sup>89</sup>

The Tribunal nevertheless rejected the Director's third argument, which asserted that Canada's regulatory scheme for admitting intense sweeteners as food additives led to results different from the schemes employed within the EC. While admitting that this factor was likely to increase demand for aspartame, the Tribunal believed it was "not very helpful in the delineation of geographic markets," as it was beyond the

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84. *NutraSweet*, No. CT-89/2 at 32.

85. *Id.* at 34.

86. *Id.* at 35.

87. *Id.* at 32-33.

88. *Id.* at 33.

89. *Id.*



scope of the critical inquiry.<sup>90</sup> In conclusion, the Tribunal found:

Country-specific clauses in multi-country contracts along with these average price differences indicate that market conditions in Canada, which include the marketing practices of NSC, can and have produced prices that differ significantly from those in other regions of competition. In other words, it is reasonable to treat Canada as a separate geographic market for the purposes of evaluating the effects of NSC's marketing practices.<sup>91</sup>

## 2. *The United States and the European Community*

### a. The United States

Under U.S. law, geographic market definition is crucial to determining the relevant market.<sup>92</sup> Sustained price differences evidence separate geographic markets: "[a]s a general proposition, an area is a separate geographic market if the change in the price of the product in that area does not, within a relevant period of time, induce substantial changes in the quantity of the product sold in other areas."<sup>93</sup> This approach is seldom disputed in U.S. antitrust cases because it is generally agreed—whether arrogantly or realistically—that the U.S., not the world, is the proper geographic market for firms that market products nationwide in America.<sup>94</sup>

### b. The European Community

The EC uses the relevant geographic market to determine the "market" in question. Geographic market is the area "where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated."<sup>95</sup>

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90. *Id.* at 32.

91. *Id.* at 35. Ironically, the Tribunal apparently accepted the reasoning of Bruce C. McDonald as set out in a paper written before he was counsel for NSC. He concluded that the geographic market would be "the approximate area from which most . . . customers come or can reasonably be attracted," a highly fact-specific inquiry which in turn would depend on product price and perishability, transportation costs and routes, and politically-imposed barriers such as customs duties, tariffs, quotas, and tax rules. *Id.* McDonald, *supra* note 41, at 61-62.

92. *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983).

93. *Statement of Federal Trade Commission Concerning Horizontal Mergers*, reprinted in 42 Antitrust & Trade Reg. Rep. (BNA) S-12 (Special Supp. June 17, 1982). Professors Areeda and Turner agree that "[r]elationships among prices and price movements in different geographic areas are also relevant evidence in respect of whether a particular area is a separate geographic market. Separate markets are indicated for a given product when its prices in separate and distinct geographic areas are relatively uncorrelated." 2 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 522 (1978).

94. See *Cass Student Adv., Inc. v. National Educ. Adv. Serv., Inc.*, 516 F.2d 1092, 1096 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975); *Agrashell, Inc. v. Hammons Prod. Co.*, 479 F.2d 269, 286 (8th Cir.), *cert. denied*, 414 U.S. 1027 (1973) ("Since no attempt was made to narrow the geographic area, we assume the relevant market area is the entire United States.").

95. *Case 27/76, United Brands Co. v. Commission*, 1978 E.C.R. 207, 270, [1978] 1 C.M.L.R. 429, 481.

When defining the geographic market of the Michelin group, for example, the Court of Justice held that because most tire manufacturers sold their products in various national markets through intermediary, national subsidiaries, Michelin's geographic market in the Netherlands was limited to the Netherlands.<sup>96</sup> Michelin vigorously protested, contending that this was too narrow, especially since "the Commission itself based its decision on factors concerning the Michelin group as a whole, such as its technological lead and financial strength which . . . relate to a much wider market or even the world market."<sup>97</sup> Nonetheless, the following facts persuaded the Court: (1) Michelin's main competitors generally adapted to the specific conditions of individual countries and carried on activities in the Netherlands through Dutch subsidiaries, and (2) Netherlands dealers obtained their supplies solely from Netherlands suppliers.<sup>98</sup>

### 3. Conclusions as to the Geographic Market

The Tribunal paralleled U.S. and EC antitrust analysis by considering geographic market definition as the second and final<sup>99</sup> component of market definition. Though the Tribunal's reasoning as to geographic market is perhaps more clear than that of its American and European wellsprings, it draws its conclusions and analysis from these waters. Price differences are clearly important in the U.S., while surely the large price differences and Canada-specific contracts (like the Netherlands-specific contracts in *Michelin*) would render Canada "an area where the objective conditions of competition applying to the product in question [would] be the same for all traders."<sup>100</sup> Additionally, both the U.S. and the EC (as exemplified by *Michelin*) tend to define the geographic market by a particular country's borders and tend not to define the entire world as the proper geographic market. (Of course, the European Community may define the geographic market as the entire Common Market, but the underlying principle is the same.) Both EC and U.S. courts would find Canada to be the proper geographic market in which to evaluate NSC's market power.

### C. Control

"Market control" (or a "dominant position" or "market power" or "monopoly power") is a prerequisite to liability under section 79, Article 86, or section 2 of the Sherman Act. Subsection 1 of this Section will lay out the issue before the Tribunal—whether, given its delineation of the product market (aspartame) and the geographic market (Canada),

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96. Case 322/81, *Nederlandsche-Banden Industrie Michelin N.V. v. Commission*, 1983 E.C.R. 3461, 3502, [1985] 1 C.M.L.R. 282, 320-21.

97. *Id.*, 1983 E.C.R. at 3501-02, [1985] 1 C.M.L.R. at 320.

98. *Id.*

99. The "requirement" of a relevant time period was implied in *NutraSweet* but not discussed.

100. *United Brands*, 1978 E.C.R. at 274, [1978] 1 C.M.L.R. at 484-85.

NSC controlled "a class or species of business" for the purposes of section 79(1)(a). Subsection 2 will lay out the case law of the U.S. and the EC regarding control. Subsection 3 will conclude that the Tribunal followed this precedent.

### 1. *NutraSweet*

If, as the Director maintained, "control" existed, the Tribunal would consider NSC's alleged anticompetitive acts. Conversely, if NSC convinced the Tribunal that control was lacking, the "abuse of dominance" portion of the case would necessarily be dismissed. The Tribunal concluded that NSC possessed control because of NSC's large market share and the numerous barriers to entry present in the market.

The Tribunal examined the *express* wording of the provision to determine the requirements for finding abuse of a dominant position. It started with the terms "control" and "class or species of business" in section 79(1)(a). Turning first to the meaning of "substantially or completely control," the Tribunal rejected the Director's proposed "dictionary definition."<sup>101</sup> The Tribunal agreed with NSC's argument that "control" meant market power which, in turn, meant "the ability to set prices over competitive levels for a considerable period."<sup>102</sup>

Although the Tribunal adopted this meaning, it expressed reservations about the interpretation because it is difficult to apply. The determining factors, such as entry barriers and market share, vary from case to case.<sup>103</sup> Additionally, factors relevant to determining market power would also be relevant to determining anticompetitive impact. Consequently, the Tribunal was reluctant to adopt a mode of analysis that would tend to collapse other subsections of section 79.<sup>104</sup>

The Director submitted that the "class or species of business" mentioned in section 79(1)(a) should be interpreted in the "commercial" rather than in the economic sense of a product market and that under a commercial interpretation, the relevant market was aspartame.<sup>105</sup>

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101. "To exercise restraint or direction upon the free action of; to dominate, command." Written Argument of the Applicant, *supra* note 31, at 17.

102. *NutraSweet*, No. CT-89/2 at 46-47.

103. *Id.* at 47.

104. *Id.* Such problems are "pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required." *Id.* at 47-48.

105. In this argument the Director relied on the definition of "class or species of business" gleaned from *Eddy Match Co. v. Queen*, (1953) 18 C.R. 357; 109 C.C.C. 1; 20 C.P.R. 107 (Que. C.A.). In that case, the defendant manufactured only wooden matches, and the "class or species of business" was limited to wooden matches and did not include other types of lighting devices. The Tribunal distinguished *Eddy Match*, however, because that case was decided by a court, not a specialized tribunal, and was evaluated under a criminal statute, not a civil one. "It would run contrary to the spirit of the [Competition Act] for the Tribunal to eschew other relevant factors . . . possible substitutes . . ." in defining a "class or species of business." *NutraSweet*, No. CT-89/2 at 55.

The Tribunal, however, consistent with its holding that "control" meant market power, agreed with NSC that "class or species of business" was synonymous with product market, since market power "makes sense" only within a product market.<sup>106</sup> The Tribunal noted, however, that the distinction was of little import since the relevant product market in Canada was the market for aspartame.<sup>107</sup>

Nevertheless, the Director maintained that even if control is equated with market power, NSC's large market share<sup>108</sup> and the presence of entry barriers<sup>109</sup> demonstrated that NSC had control.<sup>110</sup>

In response, NSC offered several arguments, all of which were rejected by the Tribunal. First, NSC argued that declining prices and increased output since 1987 indicated that NSC did not have market power. The Tribunal maintained that NSC was losing market power because it had lost its exclusive-use patent.<sup>111</sup>

Second, NSC argued that its effective market power was diminished because its largest customers, Coca-Cola and Pepsi, could protect their interests. The Tribunal, however, found that, even though NSC had to evaluate the response of these customers before it made major moves, the reverse was also true, for Coca-Cola and Pepsi had to evaluate the response of NSC before they made major moves, especially with NSC's U.S. patent in effect until 1992.<sup>112</sup>

Third, NSC maintained that competitors and potential competitors denied NSC market power. This submission was dealt with by reference to the Tribunal's discussion of the significant "barriers to entry" that exist in the manufacture of aspartame.<sup>113</sup>

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106. The Director believed that the product market should be considered in subsection 79(1)(c), in reference to the substantial lessening of competition in "a market." The Tribunal, however, believed that the logic of the entire section was better followed if the product market was "precisely" defined in subsection 79(1)(a) rather than partially dealt with in both subsection (a) and (c). *Id.* at 55-56.

107. *Id.* at 53.

108. The Director argued that a market share greater than 90% must raise a strong inference of market power. Written Argument of the Applicant, *supra* note 31, at 20.

109. The Director suggested several such barriers:

(a) process patent barriers associated with producing aspartame; (b) significant sunk costs required to produce aspartame efficiently; (c) [NSC's] contractual practices, which preclude marginal entry and therefore increase the scale of and the costs associated with initial entry; (d) [NSC's] marketing practices which require competitors to engage in similar, expensive marketing in order to compete; and (e) delays associated with regulatory approval and subsequent consumer acceptance of any new intense sweetener. *Id.* at 21.

110. *NutraSweet*, No. CT-89/2 at 48.

111. *Id.* at 49.

112. *Id.* at 49-51. The Tribunal also rejected NSC's argument that either Coke or Pepsi could set up a rival aspartame producer, citing unrecoverable start-up costs, economies of scale, and the fact that the company that did not set up such a plant would derive benefits from downward price pressures, caused by the significant worldwide excess capacity the plant would cause. *Id.* at 49-50.

113. *Id.* at 52.

The Tribunal had already concluded, however, that significant entry barriers confronted potential aspartame producers. Although a company could produce aspartame without a patent, and even though holding a patent did not guarantee that technology would be of low cost, the Tribunal found that "proprietary technology protected by trade secrecy is an impediment to entry."<sup>114</sup> Moreover, the Tribunal rejected NSC's claim that numerous "fine-chemical firms"<sup>115</sup> were potential market entrants or re-entrants. Finding a source of phenylalanine<sup>116</sup> and the increased cost of producing aspartame in general-purpose plants, most often used by fine-chemical firms, would restrict the possible entry of fine-chemical firms.<sup>117</sup> NSC's size, experience, and market position created other entry barriers. The Tribunal noted that it takes about two years to construct an aspartame plant and several months to overcome production problems.<sup>118</sup> Entry conditions would remain especially difficult until 1992, when the U.S. patent would expire and seventy-five percent of the world market consequently opened to competition.<sup>119</sup> There are also significant economies of scale associated with plants that have capacities of approximately a third of the world output. Thus, a firm wanting per-ton costs comparable to NSC would have to achieve a very large market share. Additionally, construction of a large plant would entail large, risky, unrecoverable capital outlays. Much of the investment in a dedicated aspartame plant is "sunk" because the plant is of greatly diminished value for other uses.<sup>120</sup> Finally, significant aspartame production experience would be required for a firm to meet the price of an experienced producer such as NSC.<sup>121</sup>

Having rejected NSC's arguments, the Tribunal found that, given a ninety-five percent market share and the presence of substantial entry barriers, the Director had demonstrated market power. In addition, the Tribunal agreed with the Director<sup>122</sup> that the control demonstrated was so great "that the boundaries of *substantial* need not be explored."<sup>123</sup>

## 2. *The United States and the European Community*

### a. *The United States*

In the United States, the product and geographic markets define the contours of the market, "the array of firms that currently produces or

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114. *Id.* at 37.

115. "Fine chemical firms" are those firms without plants "dedicated" to aspartame production.

116. Aspartame is produced by combining aspartic acid, a substance that is widely available and used in several industrial processes, and phenylalanine, which is used almost exclusively for aspartame production. *NutraSweet*, No. CT-89 at 35-36.

117. *Id.* at 38-39.

118. *Id.* at 43.

119. *Id.*

120. *Id.* at 43-44.

121. *Id.* at 44.

122. Written Argument of the Applicant, *supra* note 31, at 22.

123. *NutraSweet*, No. CT-89/2 at 52.

potentially will produce products that are sufficiently close substitutes to take business away from any firm or group of firms that attempts to exercise market power.”<sup>124</sup> The Court, in *Cellophane*, defined market power as “the ability to control prices or exclude competition.”<sup>125</sup> More specifically, market power enables a firm to raise prices without losing business.<sup>126</sup> Market power is not determined by size alone:

[a]lthough power may be derived from size . . . the two are not identical. . . . A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market.<sup>127</sup>

U.S. courts look closely at market share and have held that a monopoly “ordinarily may be inferred from the predominant *share* of the market.”<sup>128</sup> A large market share is not always determinative,<sup>129</sup> however, and some courts have held that “no single factor” controls such determinations because “‘market share is just the starting point for assessing market power.’”<sup>130</sup> In some cases, a high market share will support a finding of monopoly power,<sup>131</sup> but in other cases, when markets have low entry barriers or when a firm lacks control, it will not.<sup>132</sup>

Entry barriers often compliment raw market share in determining monopoly position in U.S. case law. “[A] firm with a high market share may be able to exert market power in the short run, but ‘[s]ubstantial market power can persist only if there are significant and continuing barriers to entry.’”<sup>133</sup> In *Oahu Gas*, for example, evidence of both a high, though declining, market share and significant barriers to entry during the relevant time periods made reasonable a jury finding of market power.<sup>134</sup>

In *Borden*, entry barriers from several sources were found to compliment Borden’s ninety-percent market share in the processed lemon juice market, which led to a conclusion that monopoly power was present. These included: (1) successful product differentiation, wherein

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124. Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806 (1990).

125. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1950).

126. Pitofsky, *supra* note 124, at 1806.

127. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2nd Cir. 1979).

128. *United States v. Grinnel Corp.*, 384 U.S. 563, 571 (1966) (emphasis added). See also *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988) (“best test” for market power is “relative size,” i.e., market share); *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 511 (6th Cir. 1982).

129. *Borden*, 674 F.2d at 511.

130. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (quoting *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980)).

131. *Oahu Gas*, 838 F.2d at 367 (quoting *Hunt-Wesson*, 627 F.2d at 925).

132. *Id.* at 366.

133. *Id.* (quoting 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 505 (1978)).

134. *Oahu Gas*, 838 F.2d at 366-67.

ReaLemon became almost synonymous with reconstituted lemon juice; (2) the fact that ReaLemon was extensively advertised and was the most significant (and only nationwide) advertiser throughout the relevant time period; and (3) Borden's strong resource advantage over its competitors, which allowed it to finance promotions, a public relations program, and tie-ins with other Borden products through cross-advertising and cross-coupons.<sup>135</sup>

Similarly, in *Alcoa*, Judge Hand concluded a ninety percent market share by itself was large enough to constitute a monopoly.<sup>136</sup> In *Grinnel*, "87% of the accredited central station service business le[ft] no doubt that the congeries of these defendants ha[d] monopoly power."<sup>137</sup>

#### b. The European Community

In the European Community, the process of determining market power is much the same; the ability to exercise market power is termed a "dominant position." Interpreting Article 86, the Court of Justice observed in *United Brands*:

The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.<sup>138</sup>

As interpreted by the European Court of Justice, a dominant position "derives from a combination of several factors which, taken separately, are not necessarily determinative."<sup>139</sup> As in the United States, very large market shares absent "exceptional circumstances" evidence a dominant position.<sup>140</sup> But EC courts, like U.S. courts, look beyond market share to other indicators, primarily "entry barriers," to determine the existence of market power.

For instance, in *United Brands*, even though a forty to forty-five percent share during the relevant time period was not enough to decide conclusively that UBC controlled the market,<sup>141</sup> the court did find control because significant entry barriers were present.<sup>142</sup>

135. *Borden*, 674 F.2d at 511-12.

136. *United States v. Aluminum Co. of America*, 148 F.2d 416, 425-26 (2nd Cir. 1945).

137. *United States v. Grinnel Corp.*, 384 U.S. 563, 571 (1966).

138. Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207, 277, [1978] 1 C.M.L.R. 429, 486-87.

139. *Id.* at 487.

140. Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 521, [1979] 3 C.M.L.R. 211, 275. An enterprise holding a large market share for some time is "in a position of strength which makes it an unavoidable trading partner and . . . that freedom of action . . . is the special feature of a dominant position." *Id.*

141. *United Brands*, 1978 E.C.R. at 282, [1978] 1 C.M.L.R. at 490.

142. *Id.*, 1978 E.C.R. at 284, [1978] 1 C.M.L.R. at 490-91 (barriers included large capital investments required for the creation and running of banana plantations, effects of fruit diseases and bad weather, the system of distribution for very perishable

Similarly, the Court in *Hoffmann-La Roche* examined entry barriers to conclude that, in addition to market shares between forty-seven percent and one hundred percent for various vitamins, "all the constituent elements of a dominant position were present."<sup>143</sup> Although Roche's patents for the manufacture of vitamins had expired, the firm still enjoyed technological advantages over its competitors, including a highly developed customer information and assistance service. Moreover, the firm had a very extensive and highly specialized sales network.<sup>144</sup>

Furthermore, in the EC, as in Canada, a court may infer dominant position when a firm's customers are large and powerful.<sup>145</sup>

### 3. *Conclusions as to Control*

After defining NSC's product and geographic markets, the Tribunal, as would be done in the U.S. or the EC, evaluated NSC's market power. The Tribunal used traditional American and European methods with a slight semantic twist. Both the EC and the U.S. consider market share (unless overwhelming in itself) in conjunction with many other factors in determining whether monopoly power or dominant position exist. Although the Tribunal used the same factors as the EC and U.S., such as size, experience, market position, patent portfolios and the economies of scale, it considered them when interpreting the phrase "entry barriers" rather than when examining the effects of a large market share. American or European courts would have concluded that NSC possessed market power, even if those jurisdictions would not have made a finding based on NSC's huge market share alone.

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ble product, economies of scale, expenses of an adequate commercial network, advertising campaigns, and unrecoverable costs if a risky venture attempt fails).

143. *Hoffmann-La Roche*, 1979 E.C.R. at 531, [1979] 3 C.M.L.R. at 283.

144. *Id.*, 1979 E.C.R. at 521-22, [1979] 3 C.M.L.R. at 275-76. Other EC cases illustrating this concept are manifold. See, e.g., Commission Decision 89/22 of 5 December 1988 Relating to a Proceeding under Article 86 of the EEC Treaty (Iberian Trading UK, Ltd. v. BPB Industries, plc), 1989 O.J. (L 10) 50, [1990] 4 C.M.L.R. 464, 490 (finding that a market share of 96% to 98%, reinforced by barriers such as "substantial economies" of scale and "very extensive technical and financial resources," created a dominant position); Commission Decision 85/609 of 14 December 1985 Relating to a Proceeding under Article 86 of the EEC Treaty (ECS/AKZO), 1985 O.J. (L 374) 1, 18, [1986] 3 C.M.L.R. 273, 304 (finding dominant position in presence of market share of 50% and significant barriers to entry, such as firm's commercial and marketing advantages over its rivals and its broader range of products offered); Commission Decision 88/138 of 22 December 1987 Relating to a Proceeding under Article 86 of the EEC Treaty (Eurofix Bauco v. Hilti), 1987 O.J. (L 65) 19, [1989] 4 C.M.L.R. 677 (finding dominant position in large market share, strong research and development position, well organized distribution system, and innovative products protected by patents); Case 322/81, *Nederlandsche-Banden Industrie Michelin NV. v. Commission*, 1983 E.C.R. 3461, 3503, 3510, [1985] 1 C.M.L.R. 320, 322, 327 (finding that market share of 57-65% and entry barriers such as a broad product range and strong research and development position pointed to the existence of a dominant position).

145. See, e.g., Case 322/81, *Nederlandsche Banden-Industrie Michelin N.V. v. Commission*, 1983 E.C.R. 3461, 3512, [1985] 1 C.M.L.R. 282, 328.



#### D. Practice of Anticompetitive Acts

Once market control has been established, the Tribunal must find "practice" of "anti-competitive acts" pursuant to section 79(1)(b) for the "abuse of dominance" inquiry to go forward. Subsection 1 of Part II.D will explore the Tribunal's decision to read the "practice" requirement expansively and will examine the Tribunal's reasoning in its investigation of the five types of acts the Director alleged that NSC committed: (a) abuses of governmental reporting requirements, (b) contractual exclusion of potential competitors, (c) use of contract terms associated with exclusivity, (d) selling below cost, and (e) using a United States patent to foreclose competition in Canada. Subsection 2 will examine U.S. and EC case law relevant to use of contract terms associated with exclusivity and use of a United States patent to foreclose competition in Canada. Subsection 3 will conclude that U.S. and EC precedent supported the Tribunal's conclusion that violations had occurred.

##### 1. *NutraSweet*

"Abuse of dominance" under section 79(1)(b) includes two elements: a "practice" and "anticompetitive acts."<sup>146</sup>

Because the Act does not define "practice," commentators speculated as to whether it meant "'almost anything done more than once in a short time'" or "'repetitive acts or an ongoing pricing scheme for a period of time.'"<sup>147</sup> The Tribunal held that a practice exists where more than an "isolated act or acts" is present. Additionally, the Tribunal concluded that individual anticompetitive acts taken together may constitute a "practice."<sup>148</sup>

The Director claimed that NSC engaged in eight "anticompetitive acts." The Tribunal treated the acts in five groups: abuse of governmental reporting requirements, contractual exclusion of potential competitors, use of contract terms associated with exclusivity, selling below cost, and use of the U.S. patent to foreclose competition.<sup>149</sup> Even though only one of the acts mentioned by the Director was listed in sec-

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146. Competition Act § 79(1)(b).

147. Stanbury, *supra* note 6, at 33 (quoting Warren M. H. Grover, *Use and Abuse of Market Power: Monopolies, an Overview*, in COMPETITION LAW IN CANADA, PROCEEDINGS OF THE INSIGHT CONFERENCE (Toronto, Feb. 17, 1986), Tab 5, at 4); Arthur B. James, *Abuse of a Dominant Position: A Discussion of Joint Dominance and Anti Competitive Acts*, in COMPETITION LAW OF CANADA, PROCEEDINGS OF THE INSIGHT CONFERENCE, Toronto, Feb. 17, 1986, at 5.

148. *NutraSweet*, No. CT-89/2 at 59. The Director submitted that the interpretation of practice adopted in *R. v. William E. Coultts Co. Ltd.*, [1968] 1 O.R. 549 (C.A.) should control. In that case, which was a resale price maintenance case and was therefore brought under a different section of the Competition Act, two individual instances of selling greeting cards constituted a "practice." The court held in *Coultts* that "the word [practice] is used in the section in the sense that it denotes a distinction from an isolated act or acts." *NutraSweet*, No. CT-89/2 at 58; Written Argument of the Applicant, *supra* note 31, at 23.

149. *NutraSweet*, No. CT-89/2 at 59.

tion 78, the Director maintained that all the challenged acts were anticompetitive because they "parallel[ed] the concerns addressed by the enumerated examples."<sup>150</sup> Moreover, the Tribunal held that section 78's "list of anticompetitive acts is clearly not meant to be exhaustive. . . ."<sup>151</sup>

The Director defined anticompetitive acts as acts of a firm in a dominant position that cause a purchase decision to be made for reasons other than competition on the merits.<sup>152</sup> The Tribunal agreed, but framed the proposition slightly differently. It noted that all the enumerated acts in section 78 had "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."<sup>153</sup> Thus, the Tribunal held that "an anticompetitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient."<sup>154</sup>

Since purpose can be difficult to prove, even under a civil standard of proof,<sup>155</sup> the Tribunal accepted the Director's argument that purpose could be established by "evidence of subjective intent (through verbal or written statements of personnel of [NSC]) or a consideration of the act itself (the premise that a corporation can be taken to intend the necessary and foreseeable consequences of its acts)."<sup>156</sup> The Tribunal further conceded that this will probably be the normal method of establishing purpose.<sup>157</sup>

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150. Written Argument of the Applicant, *supra* note 31, at 26.

151. *NutraSweet*, No. CT-89/2 at 57.

152. Written Argument of the Applicant, *supra* note 31, at 27. The merits are "legitimate use of skill, foresight, natural and economic forces and the law."

153. *NutraSweet*, No. CT-89/2 at 57.

154. *Id.* "This recognizes that in many cases the behavior itself could be considered pro-competitive or neutral and that it is the purpose that makes it objectionable." *DUNLOP ET AL.*, *supra* note 9, at 200.

155. Corporate intent presents especially difficult problems of proof. Internal memoranda and communications of employees, expressing exclusionary purposes as part of instructions to implement particular actions, are difficult to separate from careless expressions intended to motivate employees. *McDonald*, *supra* note 41, at 68.

156. *NutraSweet*, No. CT-89/2 at 60; see Written Argument of Applicant, *supra* note 31, at 28-34; Reply of the Applicant, The Director of Investigation and Research, Public Version at 19-20, *Director of Investigation and Research v. NutraSweet Co.*, No. CT-89/2, (Comp. Trib. Oct. 4, 1990).

157. *NutraSweet*, No. CT-89/2 at 60. The Director gathered support for this proposition from U.S. law. Written Argument of the Applicant, *supra* note 31, at 29-30. But see *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (holding that intent is irrelevant in predatory pricing cases). In *Rose Acre Farms*, Judge Easterbrook stated, in dictum,

[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation. Although reference to intent in principle could help disambiguate bits of economic evidence in rare cases, the cost (in money and error) of searching for these rare cases is too high—in large

### a. Abuse of Governmental Reporting Requirements

The Director alleged that NSC abused governmental reporting requirements with two acts: (1) NSC reported a loss on its Canadian tax returns for 1986-88 despite the expectation that NSC would profit from its strong market position, and (2) the absence of a clear explanation for NSC's method of valuing imported aspartame on customs declaration forms.<sup>158</sup> Because the Director did not attempt to demonstrate an anticompetitive purpose behind these alleged abuses, the Tribunal found the accusations to be without merit.<sup>159</sup>

### b. Contractual Exclusion of Potential Competitors

The Director then submitted that NSC had committed an anticompetitive act by using contract terms to exclude Ajinomoto<sup>160</sup> from selling aspartame in Canada through 1995.<sup>161</sup> The Tribunal rejected NSC's contention that the contract was part of an overall scheme to enhance efficiency, finding instead that "the two leading producers, each with formidable, if somewhat different, strengths have in effect agreed not to compete."<sup>162</sup> Nevertheless, the Tribunal held that the contract was not an anticompetitive act because section 78 requires "that the competitor of the dominant firm is a target not a fellow actor."<sup>163</sup> The Tribunal did not, however, immunize all "horizontal arrangements" from the reach of sections 78 and 79. It simply found that adequate justification for challenging the NSC/Ajinomoto arrangement as an anticompetitive act was lacking.<sup>164</sup>

### c. Contract Terms Associated with Exclusivity

The Director alleged that NSC engaged in a practice of anticompetitive acts by using three types of contract terms: (1) exclusive-supply clauses, (2) trademark and logo display allowances, and (3) meet-or-release and most-favored-nation clauses.<sup>165</sup> Prior to addressing the anticompetitive issue, the Tribunal found the "practice" requirement was satisfied for each of the acts. Exclusive-supply clauses and trademark-display allowances appeared in nearly every one of NSC's supply contracts; meet-or-release clauses were present in both the Pepsi and Coca-Cola contracts, and thus covered "a large volume of sales over several

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measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate.

*Id.*

158. *NutraSweet*, No. CT-89/2 at 60-61.

159. *Id.* at 61.

160. Until recently, NSC's use patents, covering most of the world, had foreclosed Ajinomoto from functioning as an independent supplier. *Id.* at 62.

161. *Id.* at 61-62.

162. *Id.* at 63.

163. *Id.* at 64.

164. *Id.*

165. *Id.* at 64-66.

years.”<sup>166</sup>

#### i. Exclusive-Supply Clauses

Under exclusive-supply clauses the purchaser promises to buy all of its aspartame from NSC; under exclusive-use clauses the purchaser is required to use NSC aspartame “as the sole or primary sweetener in some or all of the [purchaser’s] product.”<sup>167</sup> As the Tribunal stated, “[t]he two are slightly repetitive since NutraSweet brand aspartame cannot normally be purchased from anyone other than NSC.”<sup>168</sup>

The Tribunal observed that although exclusivity was not among the anticompetitive acts enumerated in section 78, it was “in this case wholly consistent with them.”<sup>169</sup> The Tribunal concluded that by giving discounts to purchasers who would display the “NutraSweet” logo and advertise jointly with NSC,<sup>170</sup> the firm essentially required buyers to use

166. *Id.* at 66.

167. *Id.* at 64.

168. *Id.* at 65.

169. *Id.* at 67. Section 77 reads in part:

- (1) (a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires the customer to
  - (i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or
  - (ii) refrain from dealing in a specified class or kind of product except by the supplier or the nominee, and
- (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favorable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; . . .
- (2) Where, on application by the Director, the Tribunal finds that the exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
  - (a) impede entry into or expansion of a firm in the market,
  - (b) impede introduction of a product into or expansion of sales of a product in the market, or
  - (c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in exclusive dealing or tied selling and continuing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Competition Act § 77. As illustrated by this section, the Competition Act has a separate provision dealing with “exclusive dealing,” which does not require the perpetrator to possess a dominant position. Predictably, the Director brought his application under the aegis of this section, and the Tribunal did find that NSC had committed violations of section 77(1)(b) (though not section 77(1)(a)). *NutraSweet*, No. CT-89/2 at 98. What is interesting is that, knowing this section to exist and that NSC’s behavior fit most neatly under its provisions, the Director maintained and the Tribunal agreed that a violation of section 79 was also present due to NSC’s market position. Such “dual liability” illustrates the breadth with which section 79 may be interpreted.

170. The tactic of identifying and promoting an ingredient is known as the “branded ingredient strategy.” See generally Eben Shapiro, *NutraSweet’s Bitter Fight*,

NSC aspartame exclusively.<sup>171</sup>

NSC argued, unsuccessfully, that exclusivity is common in the economy, that it is often necessary to distribute a product efficiently, and that it could "clearly" be the result of competitive markets.<sup>172</sup> NSC's internal documents painted a different picture, however, showing that (1) NSC believed that the strategy was necessary to prevent prices from falling to the level of marginal costs of production, a common occurrence in the "chemicals as commodities" market, and (2) NSC endeavored to "capture and to keep as much of the market as possible" as part of a "sole supplier strategy."<sup>173</sup> As a result of these considerations, and in light of the fact that the strategy was implemented when customer choice was limited by the Canadian use patent, the Tribunal found that the "purpose" element was established. "[T]he strategy has been pursued for the purpose of excluding future or existing competition and not because it is required for efficient distribution or use of the product."<sup>174</sup>

## ii. Display Allowances

In return for prominently displaying the NutraSweet name and logo on packaging or advertising in print or on television, NSC provided a substantial discount, calculated on the amount of NutraSweet purchased and not on the number of times the trademark was displayed.<sup>175</sup> The Tribunal found four problems with this scheme. First, though customers were free not to display the NutraSweet logo, they were "virtually compelled" to do so "given that the price inducement [was] of the order of 40% when both logo display and promotion allowances [were] considered."<sup>176</sup> Second, the amounts of the logo display allowances were not based on the value of the exposure to NSC, or on the value to NSC of exposure on one label as opposed to another, or on the number and

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N.Y. TIMES, Nov. 19, 1989, § 3, at 4; Nancy Ryan, *End of Patent to Alter Market for NutraSweet*, CHI. TRIB., July 15, 1991, at C1.

171. *NutraSweet*, No. CT-89/2 at 67.

[A]s long as NSC was, through its patent monopoly, the sole supplier of aspartame, the distinction between inducing the use of the name and logo through price reductions and requiring it as a condition of supply was largely a semantic one since NSC could arrange its prices so that customers had little effective choice. The branded ingredient strategy becomes a matter of exclusivity wherever the use patent expires and customers have at least the legal opportunity of buying from other suppliers.

*Id.* Though not identical, the "branded ingredient strategy" employed by NSC finds a parallel in *Borden*, a U.S. case where Borden attempted to merge the identity of its brand of processed lemon juice with processed lemon juice in general. *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 512 (6th Cir. 1982).

172. *NutraSweet*, No. CT-89/2 at 68.

173. *Id.*

174. *Id.* at 68-69. Later on, the Tribunal felt that purpose infected not only the agreements requiring exclusive supply, but also "all the contract terms related to it." *Id.* at 73. This established the purpose element for both the "display allowance" and the meet-or-release and most-favored-nation clauses.

175. *Id.* at 65.

176. *Id.* at 69.

quality of the advertising impressions.<sup>177</sup> Third, the allowances put customers in an all-or-nothing dilemma because if a customer did not want to use the display or commit to buying aspartame exclusively from NSC for a product line, the customer had to purchase the entire line of aspartame from a competing producer because the non-discount NSC price was too high. Moreover, the competing producer had to be large enough to supply aspartame for that entire line. Fourth, NutraSweet used the strategy to promote exclusivity, not its product. For example, under their contracts, Coca-Cola and Pepsi received the allowance both for large returnable bottles that did not display the trademark prominently, as well as for fountain drinks, which did not display any logo.<sup>178</sup> Thus the Tribunal concluded that "the logo display and promotion allowances [were] essentially inducements to exclusivity."<sup>179</sup>

### iii. Meet-or-Release Clauses and Most-Favored-Nation Clauses

Meet-or-release clauses gave NSC the option of meeting a competitor's bid or releasing the customer to buy from the rival supplier. Although the clauses could be seen as mitigating the effects of long-term exclusive contracts, the Tribunal did not see them that way. Though Coca-Cola and Pepsi had requested the clauses, the Tribunal held that "by making exclusivity more acceptable to customers [they] serve[d] as an inducement for customers to enter into exclusive arrangements."<sup>180</sup> In addition, the clauses discouraged competitors from submitting bids since NSC would be given the opportunity to meet any price they submitted. Consequently, the clauses posed another entry barrier to competitors.

Most-favored-nation clauses ensure "that the price to a particular customer is the lowest price paid by any customer for an equivalent volume of" a product.<sup>181</sup> Only a firm with a large market share can offer such clauses because only such a firm will be supplying the customer's competitors.<sup>182</sup> The Director suggested that such clauses induced exclusivity because they assured customers that they would not be treated worse than their competitors. Taking a different tack, the Tribunal held that the clauses did not mitigate the objectionability of the exclusive-supply clauses because large buyers would be unlikely "to exert pressure on their suppliers and thus enhance competition" if the rewards for their efforts would flow to their competitors as well.<sup>183</sup>

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177. The Director distinguished NSC's "Trade Mark Display Allowance," which was priced on a per-kilogram basis, from the purchase of advertising space on its customers' packaging, which normally would be evaluated in terms of "advertising impressions." Written Argument of the Applicant, *supra* note 31, at 57.

178. *NutraSweet*, No. CT-89/2 at 69-70.

179. *Id.* at 71.

180. *Id.* at 71-72.

181. *Id.* at 66.

182. *Id.* at 72.

183. *Id.*

#### d. Selling Below Cost: Relevant Cost Standard

The Director also alleged the NSC violated section 78(i) by selling articles at a price lower than the "acquisition cost for the purpose of disciplining or eliminating a competitor."<sup>184</sup> The Tribunal, however, noted that the term "acquisition cost" was not easily applied to manufacturing situations, and suggested that:

Parliament intended this paragraph to be applied to distribution, i.e., to situations where articles are purchased for resale. Since NSC buys product from Ajinomoto, there is a purchase and resale by NSC. [Under section 78(i)] acquisition cost is restricted to the cost of the articles and not to the cost of distributing them . . . ; that is, only the price paid to Ajinomoto, and not the marketing and distribution costs of the Canadian operations, conforms to acquisition cost.<sup>185</sup>

Thus, NSC's manufacturing and other costs were not within the sphere of application of section 78(i).

The Tribunal next turned to the possibility that NutraSweet was engaging in anticompetitive acts outside the scope of section 78(i). The point was extensively briefed, and the Tribunal accepted that "anticompetitive act" in section 79 encompassed "predatory pricing."<sup>186</sup>

In its limited analysis, the Tribunal considered that in NSC's case "marginal cost"<sup>187</sup> was an appropriate standard for determining predatory pricing. Because of the difficulty in determining marginal cost, "average variable cost"<sup>188</sup> was used as an appropriate proxy.<sup>189</sup> Despite the "strong commercial motive" to sell below cost, in order to impede entry and thereby protect the American market that will open to competition after 1992, the Director presented little evidence that NSC had in fact priced below cost. The Tribunal, therefore, reached no conclusion on this point.<sup>190</sup>

#### e. Use of United States Patents to Foreclose Competition

The Director also argued that NSC had abused its U.S. patent in three anticompetitive ways. The Tribunal quickly dismissed the first two allegations but was persuaded by the third. First, the Director argued that NSC had used the U.S. patent to extort exclusive-supply contracts from Coca-Cola and Pepsi. But the Tribunal, having dealt with this action in

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184. Competition Act § 78(i).

185. *NutraSweet*, No. CT-89/2 at 74.

186. *Id.* at 75. The Tribunal's treatment of the issue, however, was rather cursory and uninformative. *See id.*

187. "[T]he added cost of producing an additional unit." *Id.*

188. "[T]he average cost per unit of all production taking into account only the cost components that vary with output." *Id.*

189. *Id.* The Tribunal also used "average total cost per unit of production" for the periods in question when NSC was operating at plant capacity. *Id.* at 76.

190. *Id.* at 75-78. As the Director had sought no remedy concerning prices other than that they be forbidden from falling below "acquisition cost," which the Tribunal found irrelevant to the case, a specific finding on selling below cost was not required. *Id.* at 78.

other contexts, did not believe that it constituted a separate anticompetitive act.<sup>191</sup> Second, the Director argued that NSC used profits from its United States monopoly to finance below-cost pricing in Canada. The Tribunal concluded that this was part of the allegation of pricing below cost. In any event, the Tribunal believed that the Director's evidence did not support the claim.<sup>192</sup>

Finally, the Director successfully alleged that NSC had lured one customer away from its competitor through incentives in the U.S. market.<sup>193</sup> For three reasons, the Tribunal believed that NSC used "the United States patent . . . to exclude competition, and in a most heavy-handed fashion." First, since competitors could not know what incentives NSC would offer, they could not match the offer "short of providing customers with a blank check." Second, the large financial losses that NSC stood to absorb indicated that NSC was willing "to price without regard to its cost in order to prevent the expansion of HSC." Third, it was "a form of dumping in that NSC can in effect export its product at a price below that charged in the United States, without any risk to its domestic price which is protected by its exclusive patent rights."<sup>194</sup> The Tribunal thus found an anticompetitive act in the use of a monopoly position of a dominant firm in one market to achieve a competitive advantage in another market.<sup>195</sup>

## 2. *The United States and the European Community*

### a. *The United States*

In the United States, exclusive-supply contracts are considered anticompetitive only when made by a firm with dominant market power; "[s]uch conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless."<sup>196</sup> The question usually asked in such cases is whether the actions go "beyond the needs of ordinary business dealings [or] beyond the ambit of ordinary business skill."<sup>197</sup> Promises by the buyer to buy exclusively from the seller, to buy exclusively from

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191. *Id.*

192. *Id.* at 78-79.

193. NSC persuaded an American firm, Nutri/System, to convince its Canadian copacker, U.F.L. Foods, Inc., to switch from buying aspartame from Tosoh to buying from NSC. It did so by offering Nutri/System rebates on aspartame it bought in the United States. *Id.* at 79.

194. *Id.* at 79-80.

195. *Id.* at 80. The Tribunal here undermined its earlier determination that "a class or species of business" in section 79(1)(a) and "a market" in section 79(1)(c) are equivalent and mean "product market." See *supra* notes 101-06 and accompanying text. See Anderson & Khosla, *supra* note 12, at 52 (arguing that since section 79(1)(c) speaks of "a market" and not "the market," a "class or species of business" may be defined differently in sections 79(1)(a) and 79(1)(c), permitting application of abuse provisions to situations where a dominant position in one market is used to lessen competition in a different market).

196. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2nd Cir. 1979).

197. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983).



the seller for a specified time, or to buy specified amounts are all analyzed under a "rule of reason," not under *per se* rules. Every contract restricts buyers to a certain extent. Thus, determination of the illegality of an exclusive contract hinges on the extent of the foreclosure and on the business justifications of the contracting parties.<sup>198</sup>

In *Cass*,<sup>199</sup> the National Educational Advertising Services, Inc. (NEAS) possessed a seventy-five percent share of national advertising in college newspapers, a ninety-eight percent share of the placing of such advertising, and access through its contractual relationships to eighty-seven percent of the collegiate population. NEAS secured its dominant position through contracts with college newspapers, which provided that NEAS would be the paper's sole representative in securing national advertising. The District Court found the agreements violated section 2 of the Sherman Act.<sup>200</sup> On appeal, the Seventh Circuit adopted the opinion of the District Court.<sup>201</sup>

The combination of NEAS's dominant market share and NEAS's exclusive contracts created the liability. Regardless of the propriety of exclusive representation contracts in other advertising markets, "*in the context of proof of monopoly power*, these contracts [long-term, indefinite duration, exclusive representation arrangements] are anticompetitive and constitute an unfair method of competition . . . as monopolization."<sup>202</sup>

In *International Salt*,<sup>203</sup> the defendant argued that the anticompetitive effects of its contracts were mitigated by meet-or-release clauses, a position the Supreme Court rejected. Though the clauses afforded customers "some protection," they were objectionable for two reasons. First, competitors were dissuaded from making offers because they knew the dominant supplier needed only to match them to retain the business. Second, the competitors knew that their prices, sensitive commercial information, would be disclosed to their chief rival, and thus were discouraged from making bids. The provisions were held to be abusive because "[t]he appellant had at all times a priority on the business at equal prices."<sup>204</sup>

Most-favored-nation contract terms were also present in *International Salt*, a case in which a customer was entitled to general price

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198. *Id.* at 236-39.

199. *Cass Student Adv., Inc. v. National Educ. Adv. Serv., Inc.*, 407 F. Supp. 520 (N.D. Ill.), *aff'd*, 516 F.2d 1092 (7th Cir. 1976).

200. *Id.* at 524.

201. *Cass Student Adv., Inc. v. National Educ. Adv. Serv., Inc.*, 516 F.2d 1092 (7th Cir. 1976).

202. *Cass*, 407 F. Supp. at 522 (quoting *L. G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 14 (7th Cir. 1971)). See also *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990-91 (5th Cir. 1983) (firm in dominant market position violated monopolization provision of the Sherman Act, section 2, by entering into exclusive contracts with customers even when its illegal attempt to retain its monopoly failed).

203. *International Salt Co. v. United States*, 332 U.S. 392 (1947).

204. *Id.* at 397.

deductions if it purchased only the seller's products.<sup>205</sup> The defendant contended that these terms mitigated the unreasonableness of its behavior, but the Court remained unconvinced that most-favored-nation clauses relieved its anticompetitive behavior. The Court stated that the provision was of no "legal significance" because the customer received only the right to buy the product at the seller's going price in return for purchasing only the seller's product.<sup>206</sup>

The use of a dominant market position in one market to obtain an improved position, though not necessarily a dominant one, in another market, is also anathema in the United States. In *Kerasotes*,<sup>207</sup> a case uncannily similar to *Griffith*,<sup>208</sup> a firm's use of its dominant market position in other areas to secure first-run films was held to violate antitrust laws. The theme of *Kerasotes* was that "[p]roducts that may be inferior should not be allowed to prosper in a particular market as a result of [a] producer's exploitation of its monopoly position in a second market."<sup>209</sup> This is especially true when coercion is present.<sup>210</sup> Additionally, the court noted that it is of no import that a dominant position is not achieved in the target market, since the "antitrust laws prohibit not just the possession of monopoly power but also attempts to restrain trade and impede competition."<sup>211</sup>

#### b. The European Community

The EC analyzes exclusive contracts similarly. An undertaking in a dominant position violates Article 86 by entering into exclusive-supply or requirements contracts, even when the buyer requests the terms.<sup>212</sup> The Court in *Hoffmann-La Roche* explained that exclusive contracts "are incompatible with the objective of undistorted competition within the Common Market" because "they are not based on an economic transaction which justified this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and

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205. *Id.* at 396.

206. *Id.* at 397.

207. *Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, (6th Cir. 1988).

208. *United States v. Griffith*, 334 U.S. 100, 107-08 (1948). "It is indeed, 'unreasonable, per se, to foreclose competitors from any substantial market.' The antitrust laws are as much violated by the prevention of competition as by its destruction. It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Id.*

209. *Kerasotes*, 854 F.2d at 138.

210. *Id.*

211. *Id.* See also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2nd Cir. 1979) (firm's "leveraging" of monopoly power in one market to gain competitive advantage in another violates section 2 of the Sherman Act, even absent intent to monopolize, and even though competition in the "leveraged" market is merely distorted, not destroyed).

212. *Case 85/76, Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 539, [1979] 3 C.M.L.R. 211, 289.

to deny other producers access to the market.”<sup>213</sup>

In the EC, it is also an abuse of a dominant position to grant “fidelity rebates,” which are “discounts conditional on the customer’s obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.”<sup>214</sup> In *Hoffmann-La Roche*, clauses in supply contracts provided that the buyer would get a rebate or discount if it received all or nearly all of its vitamin requirements from La Roche.<sup>215</sup> The rebates were not volume rebates, for they did not depend on how many vitamins the purchaser bought, but on whether all the customer’s needs, no matter how large, were met by La Roche.<sup>216</sup> The court declared:

The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore, the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.<sup>217</sup>

The contracts were additionally anticompetitive since the rebate was granted on the purchases of all different types of vitamins. Thus, if a purchaser bought one type of vitamin from another supplier, it would lose its rebate across the whole spectrum of vitamins.<sup>218</sup>

In *Michelin*, the Court found illegal another “fidelity rebate” that offered discounts to customers who met specified, annual sales targets. These sales targets were based upon the customer’s sales figures during the previous year, and thus were not volume rebates, which would not have been an abuse.<sup>219</sup> The effect of the discount at the end of the year was to put “increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period.”<sup>220</sup> Of course, this also pressured competing dealers, who wished to sell tires near the end of the discount period, to take into account the absolute value of the discount that might be foregone.<sup>221</sup> The Court concluded:

Such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favorable of the offers made by the various competitors and to change

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213. *Id.* at 290.

214. *Id.*

215. *Id.* at 288-89.

216. *Id.* at 291.

217. *Id.* at 290.

218. *Id.* at 295.

219. Case 322/81, *Nederlandsche Banden-Industrie Michelin N.V. v. Commission*, 1983 E.C.R. 3461, 3515, [1985] 1 C.M.L.R. 282, 331.

220. *Id.*, 1983 E.C.R. at 3517, [1985] 1 C.M.L.R. at 332.

221. *Id.*, 1983 E.C.R. at 3517-18, [1985] 1 C.M.L.R. at 333.

supplier without suffering any appreciable economic disadvantage. It thus limits the dealers' choice of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.<sup>222</sup>

EC case law, like U.S. law, finds meet-or-release clauses objectionable. The applicant in *Hoffmann-La Roche* argued that the restrictive effect on competition of its contracts was mollified by the "English" (meet-or-release) clauses.<sup>223</sup> The Court held that even though the clauses helped "to remedy some of the unfair consequences"<sup>224</sup> of the contracts, they were objectionable because (1) they allowed Roche itself to "permit competition" or not simply by adjusting its prices, and (2) they gave Roche valuable information about the market and about its competitors.<sup>225</sup>

### 3. *Conclusions as to Anticompetitive Acts*

The Tribunal's analysis and conclusions resembled antitrust case law in the U.S. and the EC. First, the Tribunal removed whatever force the word "practice" possessed in section 79(1)(b). By considering anything more than one instance of a single type of act to be a practice, the Tribunal brought the section closer to American law, which broadly requires a "monopoly or an attempt to monopolize," and EC law, which encompasses any "abuse." Second, the Tribunal also interpreted section 78's list of anticompetitive acts to be a nonexhaustive one, an approach taken under American common law and also adopted by the EC. Third, all of the anticompetitive acts in which NSC was found to have engaged, including use of exclusive-supply clauses, display allowances, meet-or-release clauses, most-favored-nation clauses, and a U.S. patent to fore-

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222. *Id.*, 1983 E.C.R. at 3518, [1985] 1 C.M.L.R. at 333. Examples of the invalidity of fidelity rebates under EC law are numerous. See also Commission Decision 88/518 of 18 July 1988 Relating to a Proceeding under Article 86 of the EEC Treaty (Napier Brown v. British Sugar), 1988 O.J. (L 284) 41, 50, [1990] 4 C.M.L.R. 196, 224-25 (group commitment bonuses, designed to restrict purchasers' choice of supply and to deny competitors' access to market, held to be analogous to fidelity rebates and therefore abuse of dominant position); Commission Decision 89/22 of 5 December 1988 Relating to a Proceeding under Article 86 of the EEC Treaty (BPB Industries plc), 1988 O.J. (L 10) 50, 65, 69, [1990] 4 C.M.L.R. 464, 492, 498 (payments to firms undertaking to purchase plasterboard exclusively from supplier constituted abuse of dominant position).

223. Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 544, [1979] 3 C.M.L.R. 211, 293.

224. *Id.*

225. *Id.*, 1979 E.C.R. at 545-46, [1979] 3 C.M.L.R. at 294. See also Commission Decision 85/609 of 14 December 1985 Relating to a Proceeding under Article 86 of the EEC Treaty (ECS/AKZO), 1985 O.J. (L 374) 1, 22, [1986] 3 C.M.L.R. 273, 310 (systematically obtaining details of price offers made by other suppliers and pricing just below the lowest quote was exclusionary).

close competition in Canada, have extensive precedent in the U.S. and the EC.

#### E. Preventing or Lessening Competition Substantially in a Market

According to the statutory scheme, after finding control of the market under subsection 79(1)(a) and a practice of anticompetitive acts under subsection 79(1)(b), the Tribunal still had to find a substantial lessening of competition pursuant to subsection 79(1)(c) before it could issue an order against NSC. Subsection 1 of this Section will lay out the Tribunal's analysis. Subsection 2 will present similar U.S. and EC law. Subsection 3 will conclude that the Tribunal adhered to U.S. and EC precedents in making its determination.

##### 1. *NutraSweet*

The Tribunal completed its analysis by considering section 79(1)(c), the final element that must be present for the Tribunal to issue an order in an abuse-of-dominance case. Section 79(1)(c) requires that "the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market."<sup>226</sup> The market in question, as previously determined, was "the sale and purchase of aspartame in Canada."<sup>227</sup> The factors used to determine the presence of substantial lessening of competition resembled the ones evaluated to determine the presence of market power.<sup>228</sup> Thus, in essence, the question under section 79(1)(c) was whether the anticompetitive acts strengthened or prolonged market power.<sup>229</sup> More narrowly with respect to the two anticompetitive practices found to have occurred,<sup>230</sup> the Tribunal framed the question as "the degree to which these anticompetitive acts add to the entry barriers into the Canadian market and . . . into the industry."<sup>231</sup>

Since the Act does not define substantial lessening of competition, it was necessary for the Tribunal to analyze the term.<sup>232</sup> Yet the Tribunal's admission that factors relevant to section 79(1)(c) resemble the factors used to determine market power under section 79(1)(b) appears to confirm the arguments of critics who find this part of the Act superfluous:

Once the Tribunal has found "dominance," which by definition posits a market completely or substantially devoid of competition, and a practice of anticompetitive acts, it is unclear what additional relevance that "substantial lessening of competition" factor could have to the Tri-

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226. Critics of this subsection wonder "why an act which has been defined as anticompetitive should be condoned by the government." Martin & Martin, *supra* note 9, at 66.

227. *NutraSweet*, No. CT-89/2 at 80.

228. *Id.* at 81.

229. *Id.*

230. See *supra* notes 149-95 and accompanying text.

231. *NutraSweet*, No. CT-89/2 at 81.

232. KAISER, *supra* note 4, § 9A.03, at 10.

bunal's determination as to the existence of abusive conduct.<sup>233</sup>

The analysis of the Tribunal squared with the stated objectives of the Director, who professed not to be concerned about the competitive success of Tosoh, or about any other player in the aspartame market, as long as "each . . . competitor is able to compete on a level playing field."<sup>234</sup> To that end, the Director sought "to ensure that every competitor or potential competitor . . . is able to enter the aspartame market without having to overcome artificial entry barriers which have been erected by [NSC]."<sup>235</sup>

The Director submitted that the absence of other competitors and the limited ability of HSC to increase its market share proved that the terms of NSC's supply contracts were significant entry barriers that prevented "toehold entry."<sup>236</sup> In response, NSC presented several arguments, none of which succeeded.

Initially, NSC attributed HSC's inability to achieve more than a minute market share to "growing pains." Though the Tribunal accepted this as a possible, partial explanation, it considered the strength of such defense "diluted by the fact that, as its Canadian patent expired, NSC entered into exclusive contracts running, for the most part, to the end of 1988."<sup>237</sup> Thus, the Tribunal linked HSC's weak market position to NSC's marketing practices.<sup>238</sup> Moreover, without even addressing NSC's other defenses, the Tribunal concluded:

the exclusivity in NSC's contracts, which includes both the clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes "toehold entry" into the market and inhibits the expansion of other firms in the market. Since exclusive use and supply clauses appear in virtually all of NSC's 1989 contracts, and thus cover over 90 percent of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.<sup>239</sup>

NSC also argued that the terms of its contracts were not restrictive. In response, the Tribunal noted that it had already determined that meet-or-release and most-favored-nation clauses exacerbated rather than mitigated the anticompetitive nature of the contracts.<sup>240</sup> Though the one-year contracts theoretically did not tie up the market after their

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233. Grover & Kwinter, *supra* note 41, at 297. See also DUNLOP ET AL., *supra* note 9, at 200 (presence of "purpose" along with a dominant position might be enough to find that the practice "is likely to have the effect of preventing or lessening competition substantially in a market").

234. Reply of the Applicant, Director of Investigation and Research, Public Version at 2, Director of Investigation and Research v. NutraSweet Co., No. CT-89/2 (Comp. Trib. Oct. 4, 1990).

235. *Id.* at 9.

236. *NutraSweet*, No. CT-89/2 at 81.

237. *Id.* at 82.

238. *Id.* at 83.

239. *Id.* at 84.

240. *Id.* at 83-84.

expiration, the contracts created significant differences between NSC and its competitors after that time. For example, NSC customers would incur financial costs in removing the trademark logo from packaging and would risk that consumers would react adversely.<sup>241</sup> Further, if a firm sought another source of supply, in addition to NSC, it would have to separate its product lines to retain NSC rebates, thus entailing higher inventory costs.<sup>242</sup>

NSC maintained that it needed exclusivity for several reasons. First, it claimed that exclusivity lowered customer costs.<sup>243</sup> The Tribunal held that claims of lower costs could be made for any industry and that, since no claim could be made that the aspartame industry differed from other industries, such arguments carried no weight.<sup>244</sup> Second, NSC claimed that exclusivity protected it from free riders, since NSC bore all the costs involved in obtaining regulatory approval.<sup>245</sup> To this argument, the Tribunal succinctly replied that NSC was entitled to no more protection than its patents afforded.<sup>246</sup>

It is interesting that the Tribunal dealt only obliquely with section 79(4), the defense of superior competitive performance, which states:

[i]n determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.<sup>247</sup>

This section is part of an innovation of the new Act—the idea of efficiency trade-offs.<sup>248</sup> By means of efficiency trade-offs, Canadian competition authorities may recognize that monopolies are not inherently bad and could be “necessary to compete in world markets.”<sup>249</sup> This would explain the inconsistency inherent in such a provision. As one commen-

241. *Id.* at 85-87.

242. *Id.* at 88.

243. Customer costs would be lower because NSC could thus make investments to meet customers' needs, and because “per-unit inventory costs are less when inventories are centrally managed (by NSC).” *Id.* at 89-90.

244. *Id.* at 90.

245. *Id.*

246. *Id.* at 90-91.

247. Competition Act, § 79(4). When Bill C-91 originally was introduced, this section stated:

*no order shall be made . . . where the Tribunal finds that competition has been, is being or is likely to be prevented or lessened substantially in a market as a result of the superior competitive performance of the person or persons against whom the order is sought.*

Thus, what originally was a defense was changed into a mere factor for consideration in an apparent attempt to strengthen the Bill. Stanbury, *supra* note 6, at 33.

248. KAISER, *supra* note 4, § 14.09[4], at 72-74. Section 68 also contains an “efficiency gains” provision. The Tribunal will not prohibit a merger if the efficiency gains that accompany it will be greater than the harmful effects upon competition. *Id.* at 73.

249. *Id.* See also David Owen, *Grasping for Scale*, FIN. TIMES, Feb. 16, 1989, § I, at 28 (arguing that removal of trade barriers forces Canadian industries to restructure in order to acquire the “critical mass” necessary for international competition).

tator pointed out, "any suggestion of superior competitive performance would seem inferentially rebutted by proof of an anticompetitive practice, particularly as such proof appears, under the Act, to be predicated on a showing of predatory or anticompetitive intent."<sup>250</sup> Nonetheless, firms could use their dominant position and the consequent weakness of their rivals as evidence of superior competitive performance and economic efficiency.<sup>251</sup> Indeed, that was an original pillar of NSC's defense.<sup>252</sup> The Tribunal may have been persuaded by critics of section 79(4), or perhaps it realized that the section's intent was to preserve domestic industry in the face of foreign competition. This was not at issue, however, and the Tribunal put almost no store in section 79(4) and never addressed it directly.<sup>253</sup>

## 2. *The United States and the European Community*

### a. The United States

Under the laws of the United States, "[t]he goal of the antitrust laws, . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."<sup>254</sup> Thus, "actual injury to competition" must be present in the market where monopoly power exists.<sup>255</sup> Illegitimately acquired monopoly power is always subject to censure in the U.S. but legitimately acquired monopoly power is illegal only if used to "extend" or "maintain" market control. A negative effect on the market is required for liability to ensue.<sup>256</sup>

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250. Grover & Kwinter, *supra* note 41, at 297. See also DUNLOP ET AL., *supra* note 9, at 200-01; McDonald, *supra* note 41, at 65. See also DUNLOP ET AL., *supra* note 9, at 290 (pointing out that "practices" will rarely be the result of superior competitive performance; presumably, the purpose of the provision is to avoid divestiture of positions resulting from superior competitive performance that are efficient).

251. Stanbury, *supra* note 6, at 33.

252. *Canadian Competition Tribunal Hears First Abuse of Dominant Position Case*, 58 Antitrust & Trade Reg. Rep. (BNA) 104, 104 (Jan. 18, 1990).

253. The Tribunal's brief treatment of the section may come as a surprise to both sides, for prior to the case Director Wetston stated "[t]here will be some important factual assessments that will be required in balancing the anticompetitive behavior that we're alleging with the superior competitive performance which NutraSweet is obviously going to rely on." *New Personnel and New Programs Will Mark Competition Enforcement Throughout World*, 58 Antitrust & Trade Reg. Rep. (BNA) 80, 85-86 (Jan. 18, 1990) (quoting Director Wetston).

Relying on sections 77(2), 79(1), and 77(2), the Tribunal issued an order prohibiting NSC from enforcing agreements that (1) required NSC's Canadian customers to purchase or to use NSC aspartame exclusively, (2) provided financial inducements to purchase NSC aspartame by means of trademark display, advertising, or similar allowances, (3) inserted meet-or-release terms, or (4) involved most-favored-nation clauses, unless such clauses were included as well in NSC's supply contracts with competitors of NSC's customers.

254. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 370 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).

255. *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983).

256. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2nd Cir. 1979).



The United States recognizes defenses related to market injury and purpose. If the monopoly power is acquired through "superior skill, foresight, and industry"<sup>257</sup> or "superior product, business acumen, or historic accident,"<sup>258</sup> it is not within the ambit of the Sherman Act's prohibitions.

#### b. The European Community

The *Hoffmann-La Roche* court described the EC's "abuse of dominance" provision thus:

The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse of methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.<sup>259</sup>

Because the presence of the dominant firm has already damaged competition in the market, any anticompetitive act by that firm is an abuse, if it affects trade between Member States.<sup>260</sup> The EC, like the U.S., does not penalize superior competitive performance or dominance *per se*, but rather only in the presence of anticompetitive acts. Thus, a finding that a firm possesses a dominant position "is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market."<sup>261</sup>

#### 3. Conclusions as to Substantial Lessening of Competition

An effect on the market is required even when both monopoly power and anticompetitive acts are present. Regardless of the strength of market position and evil intent, a fortuitous absence of actual injury will prevent liability. Indeed, one might initially wonder why an "effects" test is necessary at all; when both a dominant position and anticompetitive acts already exist, finding the presence of these effects is rarely an arduous task. It is hard to imagine a situation where such conditions are

257. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2nd Cir. 1945).

258. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

259. *Case 85/76, Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 541, [1979] 3 C.M.L.R. 211, 290-91.

260. EEC TREATY, *supra* note 25, art. 86.

261. *Case 322/81, Nederlandsche Banden-Industrie Michelin N.V. v. Commission*, 1983 E.C.R. 3461, 3511, [1985] 1 C.M.L.R. 282, 325. *See also* Commission Decision 88/501 of 26 July 1988 Relating to a Proceeding under Articles 85 and 86 of the EEC Treaty (Tetra Pak I (BTG License)), 1988 O.J. (L 272) 27, 41, [1990] 4 C.M.L.R. 47, 73; Commission Decision 88/138 of 22 December 1987 Relating to a Proceeding under Article 86 of the EEC Treaty (*Eurofix Bauco v. Hilti*), 1987 O.J. (L 65) 19, [1989] C.M.L.R. 677.

present and a court could not find extension or maintenance of market control or effects on the trade among Member States. Thus, though "effects" tests are present in the EC and the U.S., they carry little weight. Similarly, in Canada the effects test was given no bite, and the Tribunal in the *NutraSweet* case did not specifically consider the substantial lessening of competition. Market power and entry barriers proved control, and, in the presence of anticompetitive acts, a substantial lessening of competition is proven by the presence of market power and entry barriers.

The U.S. and EC both have a "superior competitive performance" provision that provides analogous defenses nearer the threshold of inquiry. In the U.S., monopoly power acquired by "superior skill, industry and foresight" is not illegal,<sup>262</sup> and a firm is not challenged for acts that do not utilize that power to extend or maintain market control.<sup>263</sup> The EC neither prohibits dominant positions *per se* nor censures conduct by a firm that does not employ "methods different from those which condition normal competition."<sup>264</sup> The EC and the U.S. thus treat the defense of superior competitive performance as logically apparent. The Tribunal, by avoiding mention of superior competitive performance considerations found in section 79(4), has followed their lead.

### III. The Procedural and Analytical Framework Adopted by the Tribunal

Section II of this Note illustrates how the Tribunal adhered to U.S. and EC precedent in its substantive law determinations. Section III argues that by following this path, the Tribunal altered the structure of section 79, and in its place left machinery for antitrust analysis almost identical to the European and American models.

The Director prefaced his brief with the proposition that the Tribunal should consider as persuasive the case law of the U.S. and the EC in its *NutraSweet* decision.<sup>265</sup> Such reliance, he argued, was both necessary and proper.<sup>266</sup> It was necessary because the Competition Act's abuse provision was a civil construction with different wording and standard of proof than the old criminal provision and because of the near absence of Canadian monopoly case law.<sup>267</sup> It was proper because, although the wording of section 79 was "substantially" different from the American and European provisions, it "deal[t] with similar problems in a similar commercial context and in light of similar legal concepts."<sup>268</sup>

The Tribunal followed the course laid out by the Director and used reasoning drawn from American and European case law to decide the

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262. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

263. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979).

264. Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, 541, [1979] 3 C.M.L.R. 211, 290.

265. Written Argument of the Applicant, *supra* note 31, at 2.

266. *Id.*

267. *Id.*

268. *Id.*

case. In doing so, it replaced what had been a novel and unique "Canadian" approach to problems of monopoly power with an organ of American and European workings. Although outwardly the section retains its novel structure, it now functions similarly to section 2 of the Sherman Act or Article 86 of the Treaty of Rome.

The result is not difficult to explain. In drafting section 79, Parliament provided a novel framework, but few interstitial rules. For instance, Parliament left terms like "control" and "market" undefined; procedures and methods for establishing the presence of a "market" or "control" were absent as well. Thus, the Tribunal not only looked to American and European case law for precedent in substantive matters, such as what constitutes an anticompetitive act, but also for analytical and procedural assistance. Though not so instructed by Parliament, the Tribunal followed the method and order of analysis traditional in American and European cases: (1) define the product market, (2) define the geographic market, (3) with the "market" established, determine the presence of "control," and (4) determine whether that market control was abused through anticompetitive acts that affected competition in the market.

Since the language of section 79 did not square with the American and European approaches, the Tribunal changed the structure of the abuse provision. Section 79, as drafted by Parliament, reads:

79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.<sup>269</sup>

In interpreting the statute, however, the Tribunal (1) equated "class or species of business" with "market,"<sup>270</sup> (2) equated "control" with an ability to exercise "market power,"<sup>271</sup> (3) minimized section 79(1)(b)'s requirement of a "practice" of anticompetitive acts by requiring only one type of act to be performed twice or two types of acts to be performed once each,<sup>272</sup> (4) made section 78's list of anticompetitive acts non-exhaustive,<sup>273</sup> (5) used the factors to be considered in 79(1)(c) to determine substantial lessening of competition also as factors needed to determine an ability to exercise "control" of "a class or species of busi-

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269. Competition Act § 79.

270. See *supra* notes 45-46 and accompanying text.

271. See *supra* notes 102-06 and accompanying text.

272. See *supra* note 148 and accompanying text.

273. See *supra* note 151 and accompanying text.

ness" in section 79(1)(a),<sup>274</sup> (6) diminished the importance of section 79(1)(c)'s requirement of a substantial lessening of competition,<sup>275</sup> and (7) practically ignored section 79(4)'s superior competitive performance considerations. After this retooling by the Tribunal, section 79 would more appropriately read:

79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons possess market power in a product market in Canada or any area thereof; and

(b) that person or those persons have engaged in or are engaging in anticompetitive acts of the type illustrated in section 78, with effects upon competition in the product market arising from those acts

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

In effect, section 79, although it appears to be a new approach to "abuse of dominance" problems, was read as if it were a provision almost identical to section 2 of the Sherman Act and Article 86 of the Treaty of Rome.<sup>276</sup>

The Tribunal's conversion of section 79 does not render the new provision ineffective. It addresses the problems associated with the Combines Investigation Act<sup>277</sup> including: (1) the onerous criminal burden of proof, (2) the reluctance of judges to impose criminal sanctions, (3) lack of economic background or a healthy body of case law to guide judges, (4) lack of guidelines for businesspersons, (5) failure to focus on anticompetitive behavior by a firm in a dominant position, rather than a dominant position itself, and (6) lack of a provision to deal with dominant positions that were the product merely of superior competitive performance.<sup>278</sup>

The civil nature of the proceeding, with the consequent civil burden of proof, apparently eased the task of the Director and made the Tribunal more willing to impose liability.<sup>279</sup> Although the Tribunal could have started a new and creative course for Canadian laws, by adopting a large body of U.S. and EC case law, the Tribunal nevertheless provided

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274. See *supra* note 228 and accompanying text.

275. See *supra* notes 227-46 and accompanying text.

276. The Tribunal obliquely admitted to a transformation of section 79 in their discussion of the "control" requirement:

If all of the evidence is taken up here then the three principal elements in paragraphs (a), (b) and (c) of subsection 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required.

*NutraSweet*, No. CT-89/2 at 47-48.

277. Ch. 9, 1910 S.C. 131 (Can.).

278. See *supra* notes 8-13 and accompanying text.

279. Under the old criminal act, fourteen of the fifteen prosecutions were unsuccessful. See *supra* notes 6-7 and accompanying text.

guidance for judges and businesspeople.<sup>280</sup> The Tribunal could have changed the focus of inquiry to the anticompetitive behavior if it had adhered strictly to the wording of section 79 or if it had adopted U.S. and EC law as its own, as all three jurisdictions do not prohibit a dominant position *per se*. Arguably, the Tribunal's conspicuous avoidance of the superior competitive performance section renders unclear whether the Tribunal provides a component to deal with superior competitive performance.

Consequently, the new Canadian section is an effective one. Its potency may even have been enhanced by adopting U.S. and EC precedent, because businesspeople can predict how courts will interpret section 79. The Tribunal may simply have accepted the inevitable. Canada, after all, now has an effective antimonopoly provision, which had not been the case after Parliament's first attempt at creating one. The U.S., and the EC to a lesser extent, have engaged in active antitrust enforcement for a long time and now possess a system time-worn and honed. Perhaps it has been honed to the shape that represents the most workable method for monopoly enforcement. Perhaps not. But clearly, the course set for Canadian "abuse of dominance" law, which is to follow in the footsteps of its elder peers, is not one that will point out the flaws of the U.S. and EC frameworks any time soon.

## Conclusion

As the first case decided under section 79, *NutraSweet* was critical in determining the path Canada would take in its "abuse of dominance" actions. The Tribunal, presented with an opportunity to forge a distinctly Canadian approach to problems of market power, chose instead to adopt both the case law and the analytical framework of the U.S. and EC. Though this choice implicitly and rather dramatically changed the structure of section 79, the Tribunal cannot really be criticized for its action. Canada now has an effective "abuse of dominance" provision, one that perhaps takes an inevitable shape.

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280. As a practical matter, of course, Canadian lawyers should become familiar with U.S. and EC monopoly law as it apparently is implicitly applied in Canadian proceedings under section 79.